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Supreme Court, U.S.
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No. 96-1330

In The

Supreme Court of the United States

October Term, 1996

BRUCE R. BLACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Certiorari Before Judgment Pursuant To 28 U.S.C. § 1254(1) And 28 U.S.C. § 2101(e)

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN H. BISBEE*
LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797
Attorney for Applicant

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does 13 U.S.C. §3143(b)(1)(B)'s requirement that an appellant "raise[ ] a substantial question of law or fact" to be allowed bail pending appeal necessarily invite arbitrary application violative of due process, by reason of the absence of "minimal guidelines" on its face and in its 13 years of application by the lower federal courts, thereby requiring this Court's review before judgment below to (i) prevent the mooting of an appeal raising objectively reasonable arguments for a constitutional immunity from prosecution and statutory entitlement to probation, (ii) to provide "minimal guidelines" for application of §3143(b)(1)(B), and (iii) to preserve this Court's power of review on post-judgment certiorari?[1]

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[1] The district court and the Seventh Circuit construed only 18 U.S.C. § 3143(b)(1)(B). The government had also urged that Petitioner be detained pursuant to 18 U.S.C. § 3143(b)(2) providing for mandatory detention for those convicted of certain offenses including those proscribed under 18 U.S.C. § 2252(a)(2) and (4). Fairly comprised within the first question is the issue of whether the exemption from mandatory detention provided in 18 U.S.C. § 3145(c) upon a showing of "exceptional circumstances" provides an ascertainable standard for application by the courts. Therefore, if this case is accepted for review, Petitioner anticipates raising a second question which may be stated,

> "Have the lower courts unconstitutionally applied, by reason of its impermissible vagueness, 18 U.S.C. § 3145(c)'s requirement that appellants demonstrate "exceptional circumstances" to be allowed bail pending appeal under circumstances requiring mandatory detention under 18 U.S.C. § 3143(b)(2)?"

PARTIES IN THE COURT BELOW

Petitioner, Bruce R. Black was the Defendant in the district court and is the Defendant-Appellant, Cross-Appellee in the United States Court of Appeals for the Seventh Circuit. The Respondent, United States of America was the Plaintiff in the district court and is the Plaintiff-Appellee Cross-Appellant in Court of Appeals for the Seventh Circuit.

RULE 29.1 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Bruce Black (Petitioner), respectfully prays that a writ of certiorari issue before judgment to review the proceedings pending in the United States Court of Appeals for the Seventh Circuit in case Nos. 96-3497, 96-8078 and 96-8081[2] sustaining the district court's order of his detention pending appeal from the judgment of conviction entered by the United States District Court for the Central District of Illinois, Urbana Division, Baker, Senior Judge, on nine counts, grouped as one, on Petitioner's conditional plea of guilty of 18 U.S.C. §§2252(a)(2) and (4).

OPINIONS BELOW

1.

COURT OF APPEALS

The court of appeals has not issued any written opinions. However, it has issued a series of orders as follows:

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[2] The main appeal pending in the court below is No. 96-3497 which has been fully briefed and is awaiting scheduling for oral argument. Appeal Nos. 96-8078 and 96-8081, Apps. D and E, *infra*, were evidently created for the administrative purpose of denying Petitioner's attempts by original and first amended petitions for a writ of habeas corpus filed pursuant to 28 U.S.C. §1651 and Rule 21(c) F.R.A.P. and this Court's precedents, *Adams v. McCann*, 317 U.S. 269 (1942) and *Whitney v. Dick*, 202 U.S. 132 (1906), in aid of the Seventh Circuit's appellate jurisdiction to prevent the mooting of Petitioner's appeal by his detention during its pendency.

(A) An "Order" dated October 29, 1996 denying petitioner's "Emergency Motion Pursuant to Rule 9(b) F.R.A.P. and Circuit Rule 9(b) for Release Pending Appeal," App. A, 1a-2a, *infra*;

(B) An "Order" dated November 14, 1996, by Justice Stevens of this Court as Circuit Justice for the Seventh Circuit denying in Case No. A-355, October Term 1996, an application for release pending appeal, App. B, 3a, *infra*;

(C) An "Order" of November 25, 1996, App. C, 4a, *infra*, transferring Petitioner's petition for habeas corpus pursuant to 28 U.S.C. §1651 and Rule 21(c) F.R.A.P. in aid of the Seventh Circuit's jurisdiction to prevent the mooing of the appeal, filed on the authority of *Adams v. McCann, supra,* and *Whitney v. Dick, supra,* but not so construed by the Seventh Circuit;

(D) An "Order" dated January 13, 1997, App. D, 5a, *infra*, in appeal No. 96-8078, denying Petitioner's motion to vacate the Seventh Circuit's "Order" of November 25, 1996 transferring petition for habeas relief as "Improvidently Entered" and denying Petitioner's motion to disregard as a "nullity" the district court "Order" of December 6, 1996, denying Petitioner's original petition for habeas corpus filed to prevent the mooting of Appeal No. 96-3497 in Seventh Circuit;

(E) An "Order" dated January 29, 1997, App. E, 6a-7a, *infra*, entered in Appeal No. 96-8081, denying Petitioner's first amended petition for a writ of habeas corpus to prevent the mooting of Appeal No. 96-3497 below and denying as "moot" a motion for hearing or disposition of the petition.

2.

DISTRICT COURT

The district court issued five opinions relative to the questions presented on application for certiorari before judgment, none of which is published. In reverse chronological order the opinions are:

(A) "Order" dated December 6, 1996, denying the petition for habeas corpus Petitioner had filed in the court of appeals pursuant to 28 U.S.C. §1651 and Rule 21(c) F.R.A.P., in aid of the Seventh Circuit's jurisdiction to prevent mooting of the appeal, App. F, 8a-11a, *infra;*

(B) "Judgment" and "Order on Final Disposition," dated September 30, 1996, and related transcript, App. G, 12a-29a, *infra;*

(C) Order entitled, "Tentative Findings and Resolution of Disputed Facts Pursuant to U.S.S.G §6A1.3(b)," dated September 19, 1996, App. H, 30a-38a, *infra;*

(D) "Order" of June 4, 1996, entered on final pretrial conference and motions *in limine* and related transcript showing district court's adoption of pertinent stipulations, the stipulations attached as App. I, 39a-43a, *infra;* the order and related transcript as App. J, 44a-66a, *infra;*

(E) May 9, 1996 "Order" denying Petitioner's motion to dismiss the indictment, App. K, 67a-71a, *infra.*

JURISDICTION TO REVIEW

Petitioner's pending appeal challenges his prosecution, conviction and punishment under 18 U.S.C. §§2252(a)(2) and (4) on the grounds (i) he is immune from prosecution as his acts violative of the statute were adjudicated to be "pathologically symptomatic" of an

involuntary status; (ii) if he is not immune, he is, under this Court's precedents and holdings in the First and Second Circuits, entitled to a sentence of probation; and (iii) his conviction and sentence to imprisonment offend the rule of lenity. The district court found Petitioner is neither a danger to the community nor a risk of flight. He is detained while his appeal pends because the district court, sustained by the Seventh Circuit, said he did not raise a "substantial question." Petitioner's detention moots all three bases for his appeal under *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

This Court has jurisdiction to consider this petition and review the proceedings below pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(e). This case, "is of imperative public importance" as it requests the establishment of "minimal guidelines" necessary to due process in the application of the statute governing release on bail pending appeals. S.Ct. Rule 11. This case justifies this Court's deviation from its "normal appellate practice," and "requires immediate settlement in this Court" for the reason that its challenge to detention pending an appeal arguing a constitutional immunity from prosecution and a statutory entitlement to probation can only be resolved as a "live controversy" in the posture of this Petition for review before judgment where Petitioner claims on appeal an immunity from prosecution and is detained during the pendency of the appeal. *Id.* Stern, Gressman, Shapiro and Gellar, **Supreme Court Practice** (7th Ed. 1993). *Defunis v. Odegaard, supra; Murphy v. Hunt*, 455 U.S. 478 (1982).

The language "raise[ ] a substantial question of law or fact" is without intrinsic meaning to afford "minimal guidelines" for its application. *Kolender v. Lawson*, 461

U.S. 352, 358 (1983). It has been applied over the past 13 years by the lower courts under the rubrics "fairly debatable" and "close, could be decided the other way." Those formulations contain no intrinsic meaning providing "minimal guidelines" necessary to due process on federal appeals. *Id.; Evitts v. Lucey,* 469 U.S. 387 (1985). They have led to an array of orders granting and denying, usually denying, bail for reasons which defy understanding.

In the year ending 1990, there were 9,493 federal criminal appeals.* Statistics for the year ending June 30, 1989, reveal a mean reversal rate of 9.3%.** The Seventh Circuit reversal rate was 7.5% in 1994-95 and 5.1% in 1995-96.*** Assuming the mean reversal rate has remained and continues what it was in 1989 and assuming the number of criminal appeals remains constant,**** more than 860 individuals annually who may either have been immune from prosecution or not provably guilty beyond a reasonable doubt, *Jackson v. Virginia,* 443 U.S. 307 (1979), may be detained pending their appeals and thereby denied due process. Even given a presumption of detention pending appeal, that denial of liberty is unacceptable. It will continue unless this Court intervenes and

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* Bureau of Justice statistics, **Source, Book of Criminal Statistics – 1991.** (Source Book) p.557 (Department of Justice, 1992).

** Administrative Office of the United States Courts' Annual Report, 1989, p.154.

*** Report on the Business of the Federal Courts of the Seventh Circuit for the 12 Month Period from July 1, 1995 through June 30, 1996, p.12.

**** The number of appeals will likely rise as indicated by the 18.4% rise between 1989 and 1990. Source Book, *supra,* p.557.

grants review for the purpose of providing "minimal guidelines" to assure due process in the application of 18 U.S.C. §3143(b)(1)(B).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

18 U.S.C. §3143(b)(1)(B) provides as follows:

> "[T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . shall be detained unless the judicial officer finds . . . that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in, (i) reversal; (ii) order for a new trial; (iii) a sentence that does not include a term of imprisonment; or, (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process."

18 U.S.C. §3143(b)(2) provides that,

> "the judicial officer shall order that a person who has been found guilty of an offense in a case described in Subparagraph (A), (B) or (C)

of Subsection (f)(1) of §3142[3] and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained."

18 U.S.C. §2252(a)(2) provides:

"any person who knowingly receives, or distributes, any visual depictions [involving the use of a minor engaging in sexually explicit conduct] that has been . . . transported in interstate. . . commerce . . . shall be . . . fined under this title or imprisoned not more than ten years, or both."

18 U.S.C. §2252(a)(4)(B) provides:

"any person who knowingly possesses three or more . . . visual depiction[s] that [have] been shipped or transported in interstate . . . commerce . . . involv[ing] the use of a minor engaging in sexually explicit conduct . . . shall be fined under this title or imprisoned not more than ten years or both . . . "

18 U.S.C. §3156(a)(4)(C) provides:

"as used in §§3141-3150 of this Chapter (4) the term 'crime of violence' means – (C) any felony under Chapter 109 A or Chapter 110."[4]

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[3] In relevant part 18 U.S.C. §3142(f)(1) in relation to 18 U.S.C. §3143(b)(2) provides for mandatory detention in a case involving "a crime of violence." A "crime of violence" is defined in 18 U.S.C. §3156(a)(4)(C) as an offense included within the prohibitions of 18 U.S.C. §2251, *et seq.*

[4] 18 U.S.C. §2252 falls within Chapter 110 of the Federal Criminal Code.

18 U.S.C. §3145(c) provides in relevant part:

> "A person subject to detention pursuant to §3143(a)(2) or (b)(2), and who meets the conditions of release set forth in §3143(a)(1) or (b)(1), may be ordered released under appropriate conditions by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."

U.S.S.G. §5K2.0 p.s. and 5K2.13. Apps. O and P, 84a-87a, *infra*.

STATEMENT OF THE CASE

Petitioner was convicted on September 27, 1996, on his conditional guilty plea on nine counts, grouped as one, of receiving, collecting and transmitting child pornography. App. 12a-19a. By Stipulation, accepted by the district court, those acts were adjudicated to be pathologically symptomatic of Petitioner's involuntary status as a pedophile/ephebophile. App. 39a-43a, 48a-60a.

The district court denied, without written findings, Petitioner's motion for enlargement on bail pending appeal, saying in full:

> "Is there a substantial question in this case? The defendant asserts that he is being punished because he is an unbidden pedophile or ephebophile. He isn't. I have made that quite clear in the rulings. He is punished, he is prosecuted because he possessed, transmitted and received child pornography. That is the offense. Not that he is a pedophile or even an ephebophile. And his claim that he did it because

> he couldn't help himself is not going to result in a reversal or change in sentence."

App. 27a.[5] Petitioner had been free pending trial and sentencing, the district court finding after his plea of guilty but before sentencing that, "the evidence is clear and convincing that [Petitioner] will not flee and he offers no overt threat to society." App. 64a, 72a-74a, *infra*.

At sentencing, the district court said that,

> [Petitioner] has made no attempts at predation, no attempt at financial gain. . . . . he spent his time looking. He didn't produce materials. He didn't sell them. He had no pecuniary motivations. He didn't commit any overt act himself."

App. 23a, 25a.

The district court denied Petitioner a downward sentencing departure sufficient to warrant probation because,

> "[he] was not suffering from diminished mental capacity at the time he committed the offenses and does not qualify for a downward departure under U.S.S.G. §5K2.13. . . . In the same vein, mental and emotional conditions (pedophilia/ephebophlia) are not appropriate reasons for departure. See U.S.S.G. §5H1.3."

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[5] In its "Tentative Findings" on the government's and Petitioner's objections to the Presentence Report prior to sentencing, the district court said Petitioner's position was "senseless" as illustrated by the "rapist" "driven by involuntary lust;" the "thief" "driven by involuntary kleptomania;" and a "vehicle operator," committing manslaughter while in the "clutches of involuntary chemical substance dependency." App. 37a.

App. 37a. In its "Order" resulting in Petitioner's conditional plea of guilty, the district court said,

> "It is clear that [Petitioner] is not claiming insanity as a defense as that term is defined in 18 U.S.C. §17. [Petitioner] does not contend, within the meaning of §17, that his psychological condition of pedophilia or ephebophilia rendered him unable to appreciate the nature and quality of wrongfulness of his conduct."

App. 44a-45a.

The district court's adjudication that Petitioner's acts violative of the statute were pathologically symptomatic of his involuntary status as a pedophile/ephebophile derived from a hearing where psychiatrists for the Petitioner and government agreed on that diagnosis. Their testimony was based on examinations of the Petitioner to which they applied the criteria of the American Psychiatric Association's publication, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (4th Ed. 1994).

The government's expert, Jonathan Kelly, M.D., has published in the area of the paraphilias, particularly pedophilia and ephebophilia. He has written that, "[t]he paraphilias are chronic, not transient, disorders and are characterized by a high recidivism rate, up to 100% in some reports." Kelly, et al. *A Pharmacological Approach to Sexual Deviant Behavior in the Community*, 12 **International Journal of the Sociology of the Family**, 155, 156 (1982). Dr. Kelly has reported that pedophilia/ephebophilia "manifest themselves after puberty;" "their etiologies are often traced to psychological events in childhood but are generally unknown;" "[g]enetic, endocrinologic, or pharmacological factors may be contributory;" and they, "are

qualitative disorders in sexual direction, not quantitative disorders of sexual drive. . . . " Id.[6] (Emphasis supplied). In short, Dr. Kelly advised the government in this case that,

> "an individual may not voluntarily choose to become a pedophile or ephebophile in the same manner that a person may not . . . choose to become a claustrophobic or agoraphobic."

---

[6] That language in government's expert Kelly's writing negates the district court's first illustration supporting its view that Petitioner's position was "senseless," the rapist, "driven by involuntary lust for sexual gratification." As Dr. Kelly noted, the paraphilic dysfunction which Petitioner suffers is a qualitative not a quantitative disorder as would characterize the rapist in the district court's example.

Moreover, the DSM-IV demonstrates that the district court's illustration of the thief, "driven by an involuntary kleptomania," App. 29a, likewise is not applicable to Petitioner. Kleptomania is recognized in DSM-IV, No. 312.32, pp. 612-613, as a pathology under the limited circumstance of a "recurrent failure to resist impulses to steal objects that are not needed for personal use or their monetary value." That quality of "not being needed" inhering in kleptomania, takes it outside the pathological range of the pedophilia/ephebophilia which the district court adjudicated Petitioner to suffer. Petitioner's pedophilia/ephebophlia pathologically required the receipt and collection of child pornography to the extent accessible without resort to or requirement of intervening, non-pathological acts, such as payment of consideration.

The district court's last illustration of the "vehicle operator who commits manslaughter because he is in the clutches of involuntary chemical substance dependency," App. 29a, *infra*, might refer to a pathological disorder within the context of DSM-IV, pp. 175-272. The driver, however, would be required to prove as a pathological necessity he had to ingest whatever the substance and further prove as a pathological necessity he had to operate a motor vehicle having ingested that substance. *Powell v. Texas*, 392 U.S. 514, 548-551 (White, J. concurring).

App. 43a. In the same vein, John Money[7] has likened pedophilia/ephebophilia to the condition of being "left-handed" or "color blind." Money, *Pedophilia, New Phylism Theory as Applied to Paraphilic Lovemaps*, **Pedophilia, Biosocial Dimensions**, Jay Feierman Ed. p. 448 (Springer-Verlag, 1990).

Dr. Kelly, has said that the paraphilias, including pedophilia and ephebophilia, "are disorders of sexual behavior, such that *'unusual or bizarre imagery or acts are necessary for sexual excitement.'* " Kelly, *supra*, at 156. (Emphasis supplied). Most importantly, Kelly says, " '[s]uch imagery or acts tend to be *insistently and involuntarily repetitive.'* " *Id.* (Emphasis supplied). That is consistent with the DSM-IV, *supra*, pp. 522-523, which states the "diagnostic features" of a pedophilia as,

> "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving. . . children or other non-consenting persons. . . . *For some individuals, paraphiliac fantasies or*

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[7] John Money, Ph.D. is a Professor of medical psychology and pediatrics at the Johns Hopkins University Medical School and Hospital in Baltimore. There is a plethora of literature dealing with human sexuality in all its aspects as revealed in Posner, **Sex and Reason** (Harvard, 1992). In that literature on the sexual pathologies, Dr. Money is cited in virtually all of them, e.g. by Posner, *supra*, at 309 n.47. See also Eli Coleman, Ph.D., *Compulsive Sexual Behavior: New Concepts and Treatments*, a tribute to John Money, paper delivered at 9th Annual Meeting of the Association of Treatment of Sex Abusers in Toronto, Ontario, November, 1990 (the Haworth Press, Inc. 1991).

> *stimuli are obligatory for erotic arousal and are always included in sexual activity."*

(emphasis supplied).[8]

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[8] The DSM-IV, *supra*, says respecting "pathology" and "pathological" which encompass pedophilia/ephebophilia:

> "The definition of *mental disorder* that . . . is presented here is as useful as any other available definition and has helped to guide decisions regarding which conditions on the boundary between *normality and pathology* should be included. . . . Each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom."

DSM-IV, *supra*, Introduction at xxi. (Emphasis in original as to "mental disorders;" otherwise supplied). Additionally, the DSM-IV says that for a deviant behavior to be "pathological," it, "must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual." *Id.* at xxi-xxii.

Both federal and state appellate courts have appreciated the significance of "pathology" as set forth in the DSM-IV and previous editions. See *United States v. DiDomenico*, 985 F.2d 1159, 1161-1162 (2nd Cir. 1993) (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, (3rd Ed. 1980) (DSM-III) and the DSM-IV exclude "personality traits" from pathological problems but not "personality disorders," thereby justifying the district court's refusal to allow defendant expert testimony where he proved only a "personality trait[ ]" in support of his lack of intent defense.) *Williams v. Scudder*, 131 N.E. 481, 483 (S.Ct. Ohio 1921) (" '[P]athology,' . . . deals with the objective analysis, . . . of . . . human . . . ailments or disease, . . . [and] the diagnosis of the signs or

REASONS FOR GRANTING THE WRIT BEFORE JUDGMENT

A.

The Proceedings Below Present a Fundamental, Unresolved Issue Critical To The Integrity of Federal Criminal Appeals As The Lower Courts Apply 18 U.S.C. §3143(b)(1)(B)'s "Substantial Question" Requirement Arbitrarily Risking The Mooting Of Appeals Raising Objectively Reasonable Arguments For Reversal Before They Are Heard, Thereby Requiring This Court's Review Before Judgment By The Seventh Circuit To Provide Guidance To The Lower Courts And To Preserve This Court's Power Of Meaningful Review On Post-Judgment Certiorari.

i.

18 U.S.C. §3143(b)(1)(B)'s "Substantial Question" Requirement Is Impermissibly Vague And Requires A Limiting Construction By This Court.

The Constitution does not require that convicted defendants be accorded a direct appeal of right. *McCane v. Durstein,* 153 U.S. 684, 687-688 (1894), reaffirmed recently in *Pennsylvania v. Finley,* 481 U.S. 551, 555-556

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symptoms, . . . connected with a diseased condition"). *Bacon v. United States,* 25 N.E. 399, 400 (N.Y.Ct. App. 1890), (" 'pathology' . . . means that part of medicine which explains the nature of disease, [its] causes and symptoms. . . . A 'pathological' condition means . . . a diseased condition of the body"). Stedmans Medical Dictionary, p. 1312, (26th Ed. 1995), defines "pathology" as a term of art referring to, "morbid[ity] or disease" and, "the medical science . . . concerned with all aspects of disease, . . . with special reference to the *essential nature, causes and development of abnormal conditions as well as the structural and functional changes that result from the diseased processes."* (Emphasis supplied).

(1987). Nevertheless, once an appellate process is incorporated into a polity's criminal justice system there becomes a constitutional obligation to apply that process in a way that provides a "fair opportunity to obtain an adjudication on the merits of [any] appeal." *Evitts v. Lucey, supra,* 469 U.S. at 405. Central to procedural due process in the enforcement of any statutory scheme, particularly one prescribing criteria for penal detention is, " 'the requirement that [Congress] establish minimal guidelines to govern [its application].' " *Kolender v. Lawson,* 461 U.S. 352, 358 (1983). *Smith v. Goguen,* 415 U.S. 566, 574 (1974).

In *United States v. Salerno,* 481 U.S. 739, 746 (1987), this Court upheld the pretrial detention aspects of the Bail Reform Act of 1984 against substantive due process and Eighth Amendment excessive bail challenges. But, in doing so, this Court, "agree[d] that a primary function of bail *is to safeguard the courts' role in adjudicating guilt or innocence of [a defendant]. . . .* " 481 U.S. at 752. (Emphasis supplied).

Therefore, application of a statutory scheme restricting bail pending appeal must, under *Evitts v. Lucey, supra,* and *United States v. Salerno, supra,* provide standards which insure, "a fair opportunity to obtain an adjudication on the merits of [an] appeal," *Evitts, supra,* 469 U.S. at 405, and "safeguard the [appellate] court['s] role in adjudicating guilt or innocence of a defendant. . . . " *Salerno, supra,* 481 U.S. at 752. That means an appellate statutory scheme must be applied pursuant to " 'minimal guidelines [governing its] enforcement,' " *Kolender v. Lawson, supra,* 461 U.S. at 358, even though that scheme provides for a presumption of detention.

Before the Bail Reform Act of 1984, the circuits adhered generally to the notion that in appeals involving neither risk of flight nor danger to the community, an appellant was entitled to bail, *e.g., Jones v. United States,* 12 F.2d 708 (4th Cir. 1926), cert. denied, 271 U.S. 682; *Hardesty v. United States,* 184 Fed. 269 (6th Cir. 1911). In enacting the Bail Reform Act of 1984, Congress reversed the prevailing practice.[9] The Senate Report indicated the purpose of the Act was,

> "to reverse the presumption in favor of bail but not to deny bail entirely to persons who appeal their convictions. . . . It is the presumption [in favor of granting bail] that the committee wishes to eliminate in §3143."

The elimination of the presumption of bail where neither risk of flight nor danger to the community existed was effected by the requirement that a judicial officer find,

> "that the appeal is not for the purpose of delay and raises *a substantial question of law or fact* likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of time already served plus the expected duration of the appeal process."

But, due process precludes application of that language to defeat a meaningful, "opportunity to obtain an adjudication on the merits of an [appeal]," *Evitts v. Lucey, supra,*

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[9] Criminal appeals make a difference. See page 5 *supra* and accompanying notes.

469 U.S. at 405; due process requires its application to "safeguard the [appellate] court's role in adjudicating guilt or innocence." *United States v. Salerno, supra,* 481 U.S at 752; due process requires "minimal guidelines" to govern its application. *Kolender, supra.*

The "substantial question" language,[10] invites orders granting or denying, usually denying, bail pending appeal on the basis of little more than recitation of the words that the question presented is "substantial" or "not substantial." The words "substantial question of law or fact" possess no more intrinsic meaning than the words, "credible and reliable information" which the ordinance in *Kolender, supra,* required persons subjected to *Terry* (*v. Ohio,* 392 U.S. 1, (1968)), stops to provide police to avoid arrest. This Court held the "credible and reliable" standard facially vague and, therefore, violative of due process.

Thus, the absence of "minimal guidelines," *Kolender, supra,* intrinsic in the language "substantial question," denies appellate due process in the senses prescribed by *Kolender, supra; Salerno, supra;* and *Evitts v. Lucey, supra,* unless the courts have developed a generally accepted limiting construction containing uniform "minimum guidelines" for its application. They have not.

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[10] Petitioner is attacking only its application because it does admit of, and requires a limiting construction by this Court. See *Kolender, supra,* 461 U.S. at 355.

ii.

The Lower Courts Apply Two Criteria Defining "Substantial Question," "Fairly Debatable" And "Close, Could Be Decided The Other Way," Neither Of Which Provides "Minimal Guidelines" To Satisfy Due Process On Federal Appeals

A decade ago, in a Note entitled, "*Raising a 'Substantial Question:' The Key to Unlocking the Door under the 1984 Bail Reform Act*," 62 Notre Dame L.Rev. 192 (1987), the author collected cases from ten of the federal circuits and concluded, "the circuits disagree as to the extent Congress intended to restrict such bail [pending appeal]." Note, *supra*, 193, nn.3-6. The author concluded that "substantial question" language had spawned two identifiable standards, the "fairly debatable" and the "close question" standards, Note, *supra*, at 193-194, 197-198.

The " 'fairly debatable' " standard, the author observed, encompasses such concepts as "novel" issues; issues which, " 'ha[d] not been decided by controlling precedent,' " or which were otherwise " 'fairly doubtful or debatable.' " Note, *supra*, at 193, citing *United States v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985), and *United States v. Handy*, 761 F.2d 1279, 1282 (9th Cir. 1985). The author said courts characterized a "close question" as an issue "that very well could be decided the other way." Note, p. 193, citing *United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1995).

The Note author found that outside the Third and the Ninth Circuits, represented by *Miller, supra*, and *Handy, supra*, the circuits had adopted the more restrictive "close

question" standard. Note, *supra* at 197-198.[11] The primary rationale given for adopting the stricter "close question" standard was that courts believed the "fairly debatable" standard more lenient and did not change the regime existing before enactment of the Bail Reform Act of 1984, a view adopted by the Note author. Note, *supra*, at 204-205.

Perhaps. But, Petitioner respectfully submits that nothing which inheres in the words, "fairly debatable" and "close question" suggests why one is more or less lenient than the other. Nothing in those formulations suggests why one more effectuates the language "substantial question of law or fact" than the other. See *Kolender v. Lawson, supra.* Most importantly, nothing in the manner either of the formulations has been applied explains what they mean or how one or the other better "effectuates the intent of Congress." Thus, Petitioner respectfully submits it is impossible to read even a learned analysis of various circuit's approaches to what constitutes a "substantial question of law or fact" and understand what is a "substantial question of law or fact" or why, whatever the question, is such.

The experience in the decade since the Note was written has compounded not clarified the problem. For example, in *United States v. Steinhorn*, 927 F.2d 195 (4th Cir. 1991), the court said that it adopted,

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[11] *United States v. Bayko*, 774 F.2d 516 (1st Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985); and *United States v. Giancola, supra.*

> "the procedure first announced in *United States v. Miller*, 753 F.2d 19, (3rd Cir. 1985) and subsequently adopted by every other circuit, see *United States v. Perholtz*, 836 F.2d 554, 556 (D.C. Cir. 1987)."

Steinhorn, supra, 927 F.2d at 196. In applying the *Miller*, "fairly debatable" standard, the court in *Steinhorn, supra*, then said a court,

> "must make two inquires after finding that the appeal is not taken for purposes of delay. First, whether the question presented on appeal is a 'substantial' one. Second, if decided in favor of the accused, whether the 'substantial question' is important enough to warrant reversal or a new trial on all counts for which the district court imprisoned the defendant."

Citing *Miller, supra*, 753 F.2d at 23-24. Thus, the court in *Steinhorn* seemed to add an "importance" element to the *Miller, supra*, "fairly debatable" standard.

But, the court in *Steinhorn* then said that it was, "adopt[ing] the definition of 'substantial question' first proposed by the Eleventh Circuit in *United States v. Giancola, supra,*" i.e., a substantial question is a " 'close question or one that very well could be decided the other way.' " *Steinhorn, supra*, 927 F.2d at 196, quoting *Giancola, supra*, 754 F.2d at 901. That means, in one case, the Fourth Circuit adopted both the "fairly debatable" and the "close question" standards and added an "importance" element. But, it did so without explaining how either required the court's granting the appellant bail. The court said only the district court's refusal to instruct on entrapment presented a "close question" because, "if we reverse the

district court's ruling . . . , we would likely order a new trial." *Steinhorn, supra,* 927 F.2d at 196. No doubt. But, with all respect, the *Steinhorn* court said no more than, "appellant might win; if he does, we'll reverse and remand."

The Fifth Circuit's decision in *United States v. Clark,* 917 F.2d 177 (5th Cir. 1990), further illustrates the need for this Court's guidance. In *Clark, supra,* the court held the appellant's argument that the district court erred in applying Rule 11 Fed.R.Crim.P. and in refusing him leave to withdraw his guilty plea did not present a " 'substantial question' ". 917 F.2d at 181. That may be. But the court in *Clark, id.* then made the remarkable statement which capsulizes the problem:

> "We emphasize that nothing in this opinion *is to be construed as a reflection on the merits of Clark's appeal.* We hold only that *Clark* has failed to rebut the presumption of 18 U.S.C. §3143 and that consequently he is not entitled to release for the duration of his appeal."

(Emphasis supplied).

With all respect, that statement is disingenuous. The *Clark* court either reflected on the merits of the appeal and said they were wanting; or, it did not reflect at all, in which case the opinion does not pre-ordain the result on the merits. Neither approach is worthy of the federal appellate process guided by what citizens must be able to trust is the reality, not chimera, of due process. *Evitts v. Lucey, supra.* Without this Court's reviewing this case and providing guidance, the district courts and the courts of appeals are left in exactly the same situation as the courts in *United States v. Clark, supra,* and *Steinhorn, supra.*

The Seventh Circuit has spoken on the subject several times, e.g. *United States v. Ashman*, 964 F.2d 596 (7th Cir. 1992); *United States v. Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991); *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993), and *United States v. Schoffner*, 791 F.2d 586, 589 (7th Cir. 1986). However, as highlighted in *Harris, supra*, 942 F.2d at 1135 where the court first denied, but after oral argument granted bail as it better understood the "unique nature" of the appeal, the Seventh Circuit does not follow a discernibly consistent rationale applying its variations of the "substantial question" requirement which it characterizes as being a "close question" or imposing an "exacting standard." *Id.*[12]

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[12] In this case, the district court applied either the "*ipse dixit*" or "senseless" standard, see pp. 8-9, *supra*, setting forth in full the district court's oral statement denying Petitioner's motion for bail and p. 9 n.5, *supra*, stating the district court's view of Petitioner's defense as "senseless." Petitioner respectfully submits the district court failed to apprehend the significance of the concepts "pathology" and "pathological," as more fully explained in pp. 11-13, *supra*, and Footnotes 6 and 8, *supra*.

B.

The Proceedings Below Have Mooted, To Date, An Objectively Reasonable Challenge To A Result In Direct Conflict With This Court's Precedents Prohibiting The Criminalization Of Involuntary Statuses Under The Eighth Amendment, Thereby Requiring This Court's Review On Certiorari Before Judgment Of The Seventh Circuit To Preserve this Court's Power Of Meaningful Review On Post-Judgment Certiorari Of An Objectively Reasonable Argument For A Constitutional Immunity From Prosecution And Punishment.

This Court in *Robinson v. California*, 370 U.S. 660 (1962), held that the Eighth Amendment cruel and unusual punishment clause prohibited the conviction and punishment of an individual for the involuntary status or condition of drug addiction. In *Powell v. Texas, supra*, a plurality of the Court held that the *Robinson* rule did not apply to acts which were not shown to be part of the involuntary status of alcoholism. The plurality said the record in *Powell, supra*, did not demonstrate that defendant's alcoholism or other conditions required that he be in public while intoxicated.

Justice White provided the fifth vote supporting the plurality result in *Powell, supra*. But, his concurring opinion logically encompassing the position of the four dissenting justices stated the present state of the law on status offenses:

> "The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to

> be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic condition than of disease, although the disease may lead to destitution and perpetuate that condition. *For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.* As applied to them, this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk."

Powell, supra, 392 U.S. at 551, (Emphasis in original as to "somewhere;" otherwise supplied).[13]

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[13] Lower federal courts since 1969 have followed Justice White's concurring opinion in *Powell* in cases construing ordinances or statutes prohibiting incidents of the status of "homelessness." See *Pottinger v. City of Miami,* 810 F. Supp. 1551, 1553-1562 (S.D. Fla. 1992), remanded on limited grounds, 40 F.3d 1155 (11th Cir. 1994) and *Johnson v. City of Dallas,* 860 F. Supp. 344, 350-351 (N.D. Tex. 1994), reversed on lack of standing grounds, 61 F.3d 442 (5th Cir. 1995). The California Supreme Court in *Tobe v. City of Santa Ana,* 9 Cal. 4th, 1069, 40 Cal. Rptr. 402, (1995), however, did reverse trial on appellate courts which had struck down ordinances outlawing various acts incident to the status of "homelessness." But, the California Supreme Court refused to accept the position that "homelessness" was an involuntary status as it held was required by this Court's decision in *Robinson v. California, supra.*

There is significant academic writing on this subject. An early example is Greenawalt, *Uncontrollable Actions and the Eighth Amendment: Implications of Powell v. Texas,* 69 Col. L.Rev. 927 (1969); a later one is, Walters, *No Way Out: Eighth Amendment Protection for Do or Die Acts of Homeless,* 62 U.Chi.

Petitioner admits a powerful argument can be made in opposition to the position he is asserting. That argument exists respecting where the line is or can be drawn between an involuntary status which is immune from criminalization and punishment for acts committed incident to that status which are not immune.

Petitioner's appeal below goes to the point of departure in Justice White's concurring opinion expressing the views of five members of the Court in *Powell, supra*. This Court has not elaborated on the extent to which acts symptomatic of a status are immune from conviction and

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L.Rev. 1619 (1995). Both support Petitioner's position in this case. For example, Greenawalt, *supra*, writes at 977-978.

> "Though the issue posed in *Powell* is a close one, my judgment is that the Court should go as a matter of constitutional law as far as Justice White would. It should acknowledge that there are some persons who can present persuasive evidence that their craving a drink leaves them truly powerless, and it should recognize that the unfairness of punishing such persons for public intoxication is not outweighed by strong countervailing reasons."

Cf. Walters, *supra* at 1628-1631.

punishment since *Powell v. Texas, supra,* in 1969.[14] Different judges and authorities from other fields may view differently the strength, validity, merits, "closeness," "substantiality," and "debatability" of the questions Petitioner has presented. This Court in this or another case may ultimately reject Petitioner's position. But, Petitioner submits that the predicate of his argument being (i) supported by specific holdings of this Court and (ii) not rejected by any court which the courts below were required to follow, make his argument an "objectively reasonable" one. He submits that as an "objectively reasonable" argument in those senses, his appeal presents a "substantial question of law or fact" for purposes 18 U.S.C. §3143(b)(1)(B).[15]

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[14] Petitioner does not suggest that any affirmative act outside the medical definition of his pathology should be immune from prosecution and punishment under the Eighth Amendment. He concedes that any act or motive such as one for pecuniary gain or contributory to a market, commercial or otherwise, for the exploitation of children would not be part of his pathology and thus not immune. Any act of predation or causing harm to a child, to the extent that it might be called pathological, would be defensible, if at all, only under 18 U.S.C. §17.

[15] A question directly derived from a specific holding of this Court and not rejected by binding precedent of a lower federal court would be the median level of what Petitioner submits as an "objectively reasonable" and, therefore, "substantial" question for reversal, etc. under 18 U.S.C. §3143(b)(1)(B). Greater or lesser variations of authority for a question may likewise be "objectively reasonable" and, therefore, present a "substantial question." For example, the circuits might be silent on a question and this Court *in dicta* have suggested a result desired by an appellant. Petitioner suggests that could be the basis for a "substantial question" to the extent,

C.

The Proceedings Below Have Mooted, To Date, An Objectively Reasonable Challenge To A Sentence Of Imprisonment Contrary To This Court's Precedents And In Conflict With Results In The First And Second Circuits Under U.S.S.G. §§5K2.0 p.s. and 5K2.13, Thereby Requiring This Court's Review On Certiorari Before Judgment To Preserve This Court's Power Of Meaningful Review On Post-Judgment Certiorari Of An Objectively Reasonable Argument For A Sentence Of Probation.

This Court in *Koon v. United States*, ___ U.S. ___, 135 L.Ed.2d 392, 418 (1996), quoting U.S.S.G. §5K2.01 p.s. said that the Sentencing Guidelines, " 'place no limits on the number of potential factors that may warrant departure. . . . ' " In *Koon, supra,* this Court applied §5K2.0 p.s. to hold the Ninth Circuit erred in denying defendants a downward departure based on their police officer statuses and consequent susceptibility to abuse in prison.

In two recent cases involving prosecutions under 18 U.S.C. §2252(a), the First and the Second Circuits have articulated principles under U.S.S.G. §§5K2.0 p.s. and

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for example, it met the test of Rule 11(b)(2) Fed.R.Civ.P. as a "non-frivolous argument for the extension, modification or reversal of existing law." If a position asserted by an appellant is logically derived from this Court's holding but in conflict with one or more of the circuits, that should provide a "substantial question" as it indicates the character of one of the criteria this Court uses to grant certiorari. S.Ct. Rule 10(c) (1995). Indeed, the criteria set forth in this Court's Rule 10 provide a useful guide as to what is a "substantial question," less, of course, the requirement in Rule 10 that the question or issue be "compelling."

5K2.13 which permitted defendants sentences of probation under the same circumstances presented in this case. *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994), and *United States v. Barton*, 76 F.3d 499 (2nd Cir. 1996). In *Gifford, supra*, the First Circuit reversed a sentence to imprisonment saying that defendant's "psychological condition" permitted a downward departure under U.S.S.G. 5K2.0 p.s. and 2.13. In *Barton, supra*, the Second Circuit reversed a sentence of probation on the basis that the district court's findings insufficiently demonstrated "atypicality." *Barton, supra*, 76 F.3d at 503. But, in remanding for resentencing, the Second Circuit said that a sentence of probation in *Barton* would not be "unreasonable" if the appropriate findings were made. In both, probation was ordered on remand. App. 75a-83a, *infra*.[16]

The Sentencing Guidelines are designed to establish national sentencing uniformity. The district court's judgment sentencing Petitioner to prison is in direct conflict, on the same facts, with *Gifford, supra*, and *Barton, supra*. This case requires this Court's intervention to resolve a clear conflict between the circuits before Petitioner's appeal becomes moot and this Court no longer has the power to resolve that conflict.

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[16] Even though the defendants in *Barton, supra*, made only generalized references to "psychological or emotional conditions." The academic authorities cited in the record suggest that both were probably pedophiles or ephebophiles or both. The record in this case shows that other than criminal pornographers motivated by pecuniary gain, pedophiles and ephebophiles are the only people who can find interest in depictions of child pornography. Petitioner's circumstances are, accordingly, no different from those in *Barton, supra*, and *Gifford, supra*.

D.

The Proceedings Below Have Mooted, To Date, An Objectively Reasonable Challenge To Criminalization And Punishment Contrary To This Court's Rule Of Lenity Precedents, Thereby Requiring This Court's Review On Certiorari Before Judgment To Preserve This Court's Power Of Meaningful Review On Post-Judgment Certiorari Of A Question Raising An Objectively Reasonable Argument For Reversal.

A distinguished line of this Court's precedents[17] pay homage to a fundamental principle undergirding our common law heritage that criminal liability, "generally requires a 'vicious will.' " *Staples, supra*, 511 U.S. at 616, quoting Blackstone, Commentaries 21. Petitioner acknowledges that 18 U.S.C. §2252(a)(2) requires a *mens rea* in the form of criminal knowledge. *United States v. X-Citement Video Inc., et al.*, 513 U.S.___, 130 L. Ed. 2d 372 (1994). He acknowledges that the statute prohibits conduct which can be vicious, horrible and damaging beyond description and deserves harsh punishment.

In 1984, Congress eliminated from the prohibitions of 18 U.S.C. § 2252, the requirement of a commercial motive. In 1988, Congress added receipt and transmission by computer to the prohibited means of trafficking in child pornography. When Congress criminalized transmission by computer without adding commercial motive, intent to exploit, or some other element evidencing venality,

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[17] *United States v. Baliant*, 258 U.S. 250, 251 (1922); *Morrissette v. United States*, 342 U.S. 246, 250 (1952); *United States v. United States Gypsum Company*, 438 U.S. 422, 436-437 (1978); *Liparota v. United States*, 471 U.S. 419, 423-426 (1985); and *Staples v. United States*, 511 U.S. 600, 604-606, 616-618 (1993).

corruption, or predation, it criminalized conduct in which pedophiles like Petitioner would pathologically engage to the extent of its accessibility.

Petitioner's appeal below presents a significant argument supported by this Court's precedents and the legislative history of 18 U.S.C. §2252 for application of the rule of lenity to exempt those like Petitioner from criminalization for acts within their pathology. Those acts involve individuals governed by a "qualitative disorder in sexual direction", *Kelly, supra,* availing themselves of images and pictures in venues akin, because of the computer technology, to those historically protected, such as the public domain, the public forum and, the private home. Cf. *Stanley v. Georgia,* 394 U.S. 557 (1969) recently reaffirmed in *Jacobsen v. United States,* 503 U.S. 540, 551-552 (1992), ("a person's inclinations and 'fantasies' . . . are his own and beyond the reach of government. . . . ").

But, for that argument to be meaningfully pressed, this Court should grant review before judgment of the Seventh Circuit. Otherwise, a result at variance with this Court's rule of lenity precedents will be beyond this Court's power of review.

CONCLUSION

For the reasons above stated the Petition for Writ of Certiorari Before Judgment should be granted.

Respectfully submitted,

LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1996

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 96-3497 v. BRUCE R. BLACK, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 95 CR 20053 Harold A. Baker, Judge. (Filed Oct. 11, 1995)

Upon consideration of:

1. "EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL" filed on October 15, 1996, by counsel for appellant;

2. "MEMORANDUM IN SUPPORT OF 'EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL' " filed on October 15, 1996, by counsel for appellant;

3. "RESPONSE TO DEFENDANT-APPELLANT'S EMERGENCY MOTION PURSUANT TO RULE 9(b)

F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL" filed on October 23, 1996, by counsel for appellee; and,

4. MEMORANDUM IN SUPPORT OF THE UNITED STATES RESPONSE TO THE DEFENDANT-APPELLANT'S EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL, filed on October 23, 1996, by counsel,

IT IS ORDERED that #1 is **DENIED.**

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 14, 1996

Mr. John Bisbee
437 North Lafayette Street
Macomb, IL 61455

Re: Bruce R. Black
v. United States
Application No. A-355

Dear Mr. Bisbee:

The application for release pending appeal in the above-entitled case has been presented to Justice Stevens who on November 14, 1996, denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Cynthia Rapp
Cynthia Rapp
Assistant Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 25, 1996

Before

Hon. TERENCE T. EVANS, *Circuit Judge*

BRUCE R. BLACK, Petitioner, No. 96-8078 v. JAMES TIPPY, Warden, Respondent.	Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 95-20053 Harold A. Baker, Judge.

The following is before the court: **PETITION PURSUANT TO 28 U.S.C. § 1651 FOR THE ISSUANCE OF A WRIT OF HABEAS CORPUS IN AID OF THE COURT'S JURISDICTION TO CONSIDER AND RESOLVE THE ABOVE CAPTIONED APPEAL,** filed on November 25, 1996, by counsel for the petitioner.

The court hereby **TRANSFERS** the petition to the United States District Court for the Central District of Illinois. *See* Fed. R. App. P. 22(a). To the extent that Mr. Black seeks to expedite his direct appeal (Nos. 96-3497 and 96-3772), the court notes that such relief must be sought by separate motion.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 13, 1997

Before

Hon. TERENCE T. EVANS, Circuit Judge

BRUCE R. BLACK, Petitioner,	]	Petition for Extraordinary Writ Central District of Illinois, Danville Division. Harold A. Baker, Judge.
No. 96-8078 v.	]	
JAMES TIPPY, Warden, Respondent.	]	No. 95 CR 20053

Upon consideration of:

1. **"MOTION TO VACATE "ORDER" OF NOVEMBER 25, 1996 AS IMPROVIDENTLY ENTERED"** filed on December 2, 1996, by counsel for the petitioner.

2. **"MOTION TO DISREGARD AS A NULLITY DISTRICT COURT ORDER OF DECEMBER 2, 1996"** filed on December 9, 1996, by counsel for the petitioner.

IT IS ORDERED that #1 and #2 are DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1997

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

IN THE MATTER OF: BRUCE R. BLACK, Petitioner.	] Petition for Extraordinary Writ. United States District Court for the Central District of Illinois, Danville
No. 96-8081	] No. 95-20053
	] Hon. Harold A. Baker Judge.

The following is before the court:

1. **FIRST AMENDED PETITION PURSUANT TO 28 U.S.C. §1651 AND RULE 21(C) F.R.A.P. FOR THE ISSUANCE OF A WRIT OF HABEAS CORPUS IN AID OF THIS COURT'S JURISDICTION TO CONSIDER AND RESOLVE THE ABOVE CAPTIONED APPEAL,** filed on December 2, 1996, by counsel for the petitioner.

2. **MOTION FOR HEARING ON OR DISPOSITION WITHOUT HEARING OF APPELLANT'S "FIRST AMENDED PETITION PURSUANT TO 28 U.S.C. §1651 AND RULE 21(c) F.R.A.P. FOR THE ISSUANCE OF A WRIT OF HABEAS CORPUS IN AID**

OF THIS COURT'S JURISDICTION TO CONSIDER AND RESOLVE THE ABOVE CAPTIONED APPEAL," filed on January 2, 1997, by counsel for the petitioner.

IT IS ORDERED that #1 is **DENIED** and #2 is **DENIED** as **MOOT.**

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

BRUCE R. BLACK,
PETITIONER,

VS.

WARDEN JAMES TIPPY
RESPONDENT.

96-CV-2282

[on transfer from Seventh Circuit Court of Appeals 96-3497]

ORDER

(Filed Dec. 02, 1996)

Bruce R. Black has petitioned under the All Writs Act, 28 U.S.C. § 1651, for a writ of habeas corpus allegedly in aid of the jurisdiction of the Court of Appeals over his perfected appeal to that court from the judgment of this court. (96-3497, 7th Cir. pending) Black seeks the great writ to be enlarged on bail pending the exhaustion of his appeal rights.

Black entered a plea of guilty to eight counts of distributing or receiving child pornography under 18 U.S.C. § 2252(a)(2) and to one count of possession of three or more visual depictions of child pornography under 18 U.S.C. § 2252(a)(4)(B). On September 27, 1996 Black was sentenced to concurrent terms of eighteen months in the custody of the Attorney General followed by three years of supervised release. At the conclusion of the sentencing hearing, Black filed a notice of appeal and moved to be enlarged upon bail pending the outcome of the appeal. The motion was denied. Although Black was not likely to

flee and did not offer any threat to the community, the court was not persuaded that his appeal was not for purposes of delay. The appeal did not raise a substantial question of law or fact likely to result in a reversal or a sentence reduction under 18 U.S.C. § 3143(b)(1)(B). Black then applied to the Court of Appeals for release pending appeal and was again refused. Black then sought review of the bail decision with Circuit Justice John Paul Stevens and was refused a third time. Black then filed the pending petition which was transferred to this court under Fed.R.App.P. 22(a) for an initial ruling.

The petition raises the same issues that were presented to this court at sentencing. Black's theory of appeal is that while he possessed, transmitted and received child pornography he is not being punished for those criminal acts but is instead being punished because he is a pedophile/ephebophile in violation of his rights under the First and Eighth Amendments. Child pornography is not entitled to First Amendment protection if the proscribed conduct is sufficiently described. *New York v. Ferber*, 458 U.S. 747, 762 (1992). The criminalization of possession, transmission and receipt of child pornography in 18 U.S.C. § 2252 serves a compelling governmental purpose. "It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing the demand." *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990). The Eighth Amendment argument is equally without merit. Black was not singled out for prosecution because he is a pedophile/ephebophile. He was prosecuted because he possessed, transmitted and received material depicting prepubescent

children engaged in explicit sexual conduct. Even if Black's pedophilia is unbidden and the collection of the pornography was driven by the unbidden condition, it will not sustain an Eighth Amendment claim. Explaining its decision in *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court in *Powell v. Texas*, said:

> The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms has committed some *actus reus*. It does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."
>
> —

Powell v. Texas, 392 U.S. 514, 533 (1968).

For these reasons the petition should be denied.

Federal Rule of Appellate Procedure 22 also requires that this court say whether a certificate of probable cause is warranted. It is not. Black's arguments are frivolous. They do not present substantial questions that merit review. Moreover, Black has a pending, perfected appeal in the Seventh Circuit Court of Appeals that raises the precise issues that are in the petition for habeas corpus. Instead of seeking an accelerated disposition schedule for that appeal, as suggested in the order of transfer to this court of the pending petition, Black states that if habeas corpus is denied, he will seek certiorari in the Supreme Court. He will not pursue his open avenue of appeal. Black recognizes that a petition for certiorari will delay

matters for about ten months and that he stands less than a two percent chance of his petition being allowed. It is on that spurious ground that Black rests his claim that if habeas corpus is denied his appeal will be rendered moot and extinguished. The claim is bizarre and unfounded. Instead of pressing forward with his points on appeal, Black's counsel seems consumed with the ambition of having a case accepted for review by the Supreme Court.

No certificate of probable cause is warranted.

IT IS THEREFORE ORDERED that the petition for habeas corpus is denied and that no certificate of probable cause shall issue.

Enter this 6th day of December 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
Central District of Illinois

UNITED STATES OF AMERICA

V.

BRUCE R. BLACK

JUDGMENT IN A CRIMINAL CASE
(Filed Sep. 27, 1996)
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:95CR20053-001

John H. Bisbee
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 thru 9

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[ ] was found guilty on count(s) ___ after a plea of not guilty.

Title & Section
18 U.S.C. § 2252(a)(2)

18 U.S.C. § 2252(a)(4)(B)

Nature of Offense
Distributing or receiving child pornography

Possession of three or more visual depictions of child pornography

Date Offense Concluded
10/28/1994

Illegible

Count Number(s)
1-8

Illegible

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 334-58-0728

Defendant's Date of Birth: 01/29/1967

Defendant's USM No.: 10560-026

Defendant's Residence Address:
488 Maisbury Court

Rantoul IL 61866

09/27/1996
Date of Imposition of Judgment

/s/ Harold A. Baker
Signature of Judicial Officer

HAROLD A. BAKER U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

9/27/96
Date

Defendant's Mailing
Address:
488 Maisbury Court

Rantoul IL 61866

DEFENDANT: BRUCE R. BLACK
CASE NUMBER: 2:95CR20053-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 month(s).

Said term shall consist of 18 months on each of Counts 1 through 9, to be served concurrently.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before 2 p.m. on 10/30/1996.
[ ] as notified by the United States marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

_____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 95-20053

BRUCE BLACK,

Defendant.

ORDER ON FINAL DISPOSITION

(Filed Sep. 30, 1996)

On September 27, 1996, this case was before the court for final disposition. The government appeared through Colin Bruce, Assistant United States Attorney and Kathy McClure, trial attorney, United States Department of Justice. The Defendant appeared personally accompanied by his attorney, John Bisbee.

The proceedings on final disposition have been protracted as the record shows. The court adopts paragraphs 1 through 102 of the presentence report as its findings in this proceedings with the exceptions of paragraph 36 to which the court has sustained the defendant's objection as stated in the court's tentative findings under U.S.S.G. §6A1.5E. The government originally objected to the recommendation in paragraphs 33 and 40 of the presentence report that grouped the counts of conviction for determination of an offense level. The government has withdrawn that objection, to quote the United States Attorney, "in the interest of justice." The Court adopts as final its tentative findings on pages 2, 3, 4, 5, and 6 of Docket #66 but not paragraphs 8a, 9, and 10 on page 5, which are

rendered moot by the government's withdrawal of its objection to paragraphs 33 and 40 of the presentence report.

Having heard the remarks of counsel and considered the present posture of the objections, the court makes the following findings. On the grouped counts, the court computes the base offense level at 15. The specific offense characteristic of two is added for the depiction of prepubescent minors. The court sustains the objection of five additional points for production, transportation, and possession with intent to distribute as shown in paragraph 36 for the reasons heretofore stated by the court. I believe the guidelines in plain language provide that in the absence of intent for pecuniary gain those points should not be added. The adjusted offense level is 17. Allowing two points for acceptance of responsibility, the total offense level is 15 and the defendant's criminal history category is I. The guideline sentence is 18 to 24 months. The guideline fine is $4,000 to $40,000. The defendant is not eligible for probation. The special assessment is $450, $50 on each count of conviction.

The court having heard the recommendations of the lawyers and the statement in allocution by the defendant orders the following disposition in the case for the reasons that are stated.

As an initial matter, I should like to express my respect for the United States Attorney's Office and the final position that they have taken in this very difficult matter. It shows once again, it is not a revelation or a singular occurrence, the professional integrity of that office. I do respect them for that.

The policy against trafficking in any way in child pornography ~~is~~ clear. I agree with the majority of those circuit courts who have said that the primary victim is the child depicted and that the secondary victim is society as a whole. This particular defendant spent his time looking. He was passive. He didn't produce materials. He didn't sell them. He had no pecuniary motivation. He didn't commit any overt act himself. But his activity still furthered the dissemination of child pornography and therefore the victimization of children.

The defendant is at present embarked in a rather intense program of therapy which I intend to order continued. He does not have the financial ability to pay a fine. And, of course, he is subject to two years of supervised release on each count of conviction.

As I say, I respect the United States Attorney's Office and I respect their recommendation to me of 24 months. But the final burden rests with me, and I have to say that I think that 18 months for this defendant, plus the intensive therapy and continued supervision for three years, is a proper disposition in light of the ends of individual deterrence, general deterrence, and punishment. As in so many other cases, I just hope I'm right in my assessment of the defendant.

It is the judgment of the court that the defendant is committed to the custody of the Attorney General of the United States, or her authorized representative, for the term of 18 months. He is further sentenced to a term of supervised release of three years. These sentences are on the counts of conviction and are to be concurrent. No fine is imposed due to the defendant's financial position.

He is to report within 72 hours of his release to the probation office in the district in which he is released and enter on the term of supervised release. In addition to the standard terms of supervised release, he shall participate in psychiatric services or a program of mental health counseling treatment, to include participation in the sex offender treatment program as directed by the United States Probation Service and shall take any and all prescribed medications as directed by the treatment providers. He shall pay for these services as directed by the probation service. During the term of supervised release he shall have no unsupervised contact with minor children under the age of 18, including, but not limited to, personal, verbal, or contact by computer, or other communication methods. He shall not possess, distribute, or receive child pornography via on line computer or by any other means of communication. He is prohibited from owning, possessing, or using a computer other than for work related purposes or as he otherwise may be specifically authorized by the United States Probation Service.

He shall not own, possess, or purchase a firearm, ammunition, explosive device, or other dangerous weapon. He must pay the Clerk of the court $450 in special assessments on the counts of conviction.

The property sought by the government for forfeiture is forfeited to the United States. An order shall be presented to the court for entry.

ENTER this 30th day of September, 1996.

/s/ Harold A. Baker
HAROLD A. BAKER
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 95-20053
vs.	)	
BRUCE R. BLACK,	)	
Defendant.	)	

REPORT OF PROCEEDINGS
SEPTEMBER 27, 1997

BEFORE THE HONORABLE HAROLD A. BAKER

U.S. ATTORNEY'S OFFICE
201 South Vine Street
Urbana, IL 61801
For: The Government
BY: Mr. Colin S. Bruce

LAW OFFICE OF JOHN H. BISBEE
437 North LaFayette Street
Macomb, IL 61455
For the Defendant
BY: Mr. John H. Bisbee

MATTHEWS COURT REPORTING
659 East Meyers Street
Monticello, IL 61856
(217) 762-3811 * (800) 262-3396
Holly Wingstrom, CSR #084-003888

[p. 2] **SEPTEMBER 27, 1996**

CLERK: This is 95-20053 United States of America versus Bruce R. Black.

THE COURT: State your appearances, Government.

MR. BRUCE: Colin Bruce on behalf of the United States accompanied by Kathy McClure from the Department of Justice, Child Exploitation and Obscenity Section.

THE COURT: For the Defendant?

MR. BISBEE: John Bisbee on behalf of the Defendant, and the court record should reflect that Mr. Black likewise is present in person.

THE COURT: This is the continued hearing entitled "Final Disposition" in the case. I have received the written responses of both the Government and the defendant and reviewed them.

I have one additional observation of my own that has arisen through discussions with the reporting probation officer and a consideration of re-examination of the allotment of offense level additions for prepubescent children being depicted in the images which are the subjects of the various counts of the indictment.

The report or the information that the court has from Dr. Buetow's examination would indicate that, with the exception of Count III, prepubescent children are

* * *

[p. 8] negotiated in any manner whatsoever.

I will tell the Court that in the future the next time that our office is involved in a case as rare [sic] this one, hopefully we will be; we will do more thorough research on the grouping issue.

The third point she would like me to point out is also that this area is so esoteric that not even the probation officer thought about this until the Government raised its objections.

THE COURT: I accept everything you say, and I don't doubt for one second that the United States Attorney's Office and you acted in the best of faith. If I thought otherwise, I would take appropriate steps. I am confident that you acted in good faith.

But what I am trying to, I guess, get across to you is going straight to the bottom line. Isn't a year and a half sentence for a defendant like this, under the particular facts and intensive therapy, he has made no attempts predation, then no attempt at financial gain, isn't that a sufficient disposition that you can hold your head up high with to work deterrence and individual punishment? And that additional consideration plus this mutual misunderstanding or misapprehension or whatever you want to call it should enter into your thinking. I

* * *

[p. 11] We'll have another recess. Mr. Russell, would you come to chambers.

(Whereupon the Court took a recess.)

THE COURT: Having heard the remarks of the United States Attorney, the Court makes the following

amendments to its findings which will ultimately be reflected in the Court's written orders of final disposition:

The Court computes the base offense level at fifteen. The specific offense characteristic of two is added for the depiction of prepubescent minors.

The Court suspects the coercion of five additional points for production, transportation and possession with intent to distribute as shown in paragraph 36 for the reasons heretofore stated by the Court: That I believe the guidelines in plain language provide that in the absence of pecuniary gain or the intent for pecuniary gain, those points should not be added.

The adjusted offense level is seventeen allowing two points for acceptance and responsibility. The total offense level is fifteen. The defendant's criminal history category is one. The guideline sentence is eighteen to twenty-four months. The guideline fine is $4,000 to $40,000. He is not eligible for probation and

* * *

[p. 20] Final position that they have taken in this very difficult matter. It shows once again it is not a revelation or a singular occurrence. it shows the professional integrity of that office. I do respect them for that.

The case is a very difficult one. The policy against trafficing [sic] in any way in child pornography is clear.

I agree with the majority of those circuit courts who have said the primary victim is the child depicted and that the secondary victim is society as a whole.

This particular defendant spent his time looking. He didn't produce the materials. He didn't sell them. He had no pecuniary motivations. He didn't commit any overt act himself.

But the activities still further the dissemination of child pornography and therefore further result in the victimization of children.

The Defendant is at present embarked in a rather intense program of therapy, which I intend to order continued. He doesn't have the financial ability to pay a fine. And of course he is subject to three years on each count of conviction and three years of supervised release.

[p. 21] Well, as I say, I respect the United States Attorney's Office and I respect their recommendations to me of twenty-four months; but the final burden rests with me. And I have to say that I think the eighteen months for this defendant plus the intensive therapy and the continued supervision for three years is a proper disposition in light of the ends of individual deterrence, general deterrence and punishment. As in so many other cases, I just hope I am right.

It is the judgment of the court that the defendant be committed to the custody of the Attorney General of the United States or her authorized representative for the term of eighteen months. He is further sentenced to a term of supervised release of three years. These sentences are on the counts of conviction and are to be concurrent. Three years supervised release.

He is to report within seventy-two hours of his release to the probation office in the district in which he is released and enter on the terms of supervised release.

In addition to the standard terms of supervised release he shall participate in psychiatric services or a program of mental health counseling treatment to include

* * *

[p. 25] THE COURT: The Clerk is directed to file a notice of appeal on behalf of the Defendant and the court reporters are directed to prepare a transcript of the proceedings in this matter.

That leaves the motion which you filed prematurely to be enlarged on bail pending appeal.

The other thing that I wanted to mention, I guess it occurred to me later, but in support of the rationale, the Court will not reform plea agreements. And I think that has become a moot issue in this matter now. But that one sentence in Rule 11 that says the Court shall not participate in any Rule 11 discussions is a clear policy statement as to why a court shouldn't embark upon reforming plea agreements to the parties.

That is just something I wanted to mention in the record and almost forgot.

Now, the motion to be enlarged on bail pending appeal. There is in this case, I believe a statutory provision, 18 U.S.C. 3143(b)2, appears to require the Court to detain the Defendant because of the nature of the crime he has been found guilty of.

What is the Government's position, please.

MS. MCCLURE: Your Honor, we object to the Defendant's request for release pending appeal based on

* * *

[p. 31] the Second Circuit in Barton had said.

So those three cases it seems to me, Your Honor, mandate that – well, I don't want to say anything mandates anything.

THE COURT: We'll have a recess. I am going to go look at the *Eaken* case.

(Whereupon the Court took a recess.)

THE COURT: The question before the Court is whether the appeal raises a substantial question of law and fact. And, of course, that is the basis that *Eaken* points out.

And the court sees by an unfortunate remark about two Circuit judges disagreeing with him. But Judge Easterbrook points out in his dissent that, "I have also said there was no substantial question."

Is there a substantial question in this case? The Defendant asserts that he is being punished because he is an unbidden pedophile or ephebophile. He isn't. I have made that quite clear in the rulings. He is punished, he is prosecuted because he possessed, transmitted and received child pornography. That is the offense. Not that he is a pedophile or even an ephebophile. and his claim that he did it because he couldn't help himself is not going to result in a reversal [p. 32] or a change in sentence.

The motion to be enlarged on bail pending appeal is denied because the appeal doesn't raise a substantial question of the law.

The defendant is directed to surrender himself. I see no point in taking him into custody at this point. He has been on bail and he can surrender himself within thirty days. He is to surrender himself to the institution designated by the Department of Justice on October 30 at 2:00 p.m. His bail is to remain in force in the interim.

Now you can go to the Court of Appeals and see if they disagree with that and they will enlarge him on bail.

MR. BISBEE: I understand. Thank you, Your Honor.

THE COURT: Anything else to come before the Court at this time?

MR. BISBEE: No, Your Honor.

THE COURT: The court is in recess.

(Whereupon the Court recessed.)

[p. 33] **CERTIFIED SHORTHAND REPORTER'S CERTIFICATION**

I, HOLLY WINGSTROM, Certified Shorthand Reporter and Notary Public of the State of Illinois, do hereby certify that these were the proceedings before me on September 27, 1996.

I do further certify that I did take stenographic notes of the hearing and that said notes were reduced to typewritten form under my direction and supervision.

I do further certify that the attached and foregoing is a true, correct, and complete copy of my notes and that said testimony is now herewith returned.

I do further certify that I am not related in any way to any of the parties involved in this action and have no interest in the outcome thereof.

Signed and dated in Monticello, Illinois this 30th day of September, A.D. 1996, and given under my hand and seal.

/s/ Holly Wingstrom
Holly Wingstrom, CSR
and Notary Public

OFFICIAL SEAL
HOLLY WINGSTROM
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-30-99

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

PLAINTIFF,

VS. 95-CR-20053

BRUCE BLACK,

DEFENDANT.

ORDER ON DEFENDANT'S MOTION TO STRIKE GOVERNMENT OBJECTIONS OR IN THE ALTERNATIVE TO SET ASIDE THE PLEA AGREEMENT AND TENTATIVE FINDINGS AND RESOLUTION OF DISPUTED FACTS PURSUANT TO U.S.S.G. §6A1.3(b)

(Filed Sep. 19, 1996)

I.

The government filed an objection to the recommended adjusted offense level in paragraph 40 of the presentence report. The government argues that the offenses in the separate counts should not be grouped but considered individually for purposes of determining the appropriate offense level. The defendant moved to strike the objection because it violated the plea agreement or, alternatively, during oral argument, to permit the defendant to withdraw the plea agreement.

During the hearing on the government's objection, the prosecutor and the defense attorney agreed that they assumed that the counts would be grouped for guideline determination. It is apparent, and they do not disagree,

that they had a mutual misapprehension of the impact of the guidelines on the determination of the offense level. Defense counsel insists that the understanding was that the counts would be grouped and not considered separately. The written plea agreement is silent about grouping the counts for offense level determination. The plea agreement does say:

> SENTENCING RECOMMENDATIONS AND THEIR EFFECT UPON THE COURT
>
> 7. Both the United States and the defendant remain free to recommend whatever sentence each party respectively deems appropriate.
>
> 8. The defendant understand that at the time of sentencing the Court will not be bound by any agreements or stipulations between the parties, nor by any recommendation made by any party, and that the Court will be free to impose whatever sentence it deems appropriate up to the statutory maximum.
>
> 9. The defendant understands that the Court is required to consider any applicable Federal Sentencing Guidelines, but may depart from those guidelines under some circumstances.
>
> 10. The defendant agrees and understands that he will not be allowed to withdraw his guilty plea because of an objection to the calculation of the Sentencing Guidelines or to the Court's sentencing findings or rulings.
>
> * * *
>
> I affirm that absolutely no promises, agreements, understandings, or conditions have been made or entered into in connection with my

decision to plead guilty except those set forth in this plea agreement.

United States v. Atkinson, 979 F.2d 1219 (7th Cir. 1992) addresses the question of reformation of a plea agreement for mutual mistake. "We cannot accept the government's suggestion that we reform the plea agreement on the basis that the parties made a mutual mistake about its premises. While a contract may be reformed for a mutual mistake, this remedy is appropriate only when the contract fails to reflect accurately the terms of the agreement. This is not the case here. In any event, many courts, including this one, have recognized that the contract law analogy has limits in this context and reformation seems to be one of them. *See, e.g., Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992) (noting that the plea agreements are "unique contracts"); *United States v. Olesen*, 920 F.2d 538 (8th Cir. 1990) (reversing the district court's reformation of a plea agreement). *Id.* at 1223. *Accord, United States v. Zweber*, 913 F.2d 705, 711 (9th Cir. 1990) (counsel's mistake on whether evidence was admissible was not a ground for withdrawal of plea agreement); *United States v. Kuhl*, 816 F.Supp. 623, 628 (S.D. Cal. 1993) (reformation of plea agreement for mutual mistake not allowed).

The court finds no violation of the plea agreement but rather that the application of the sentencing guidelines did not work out the way the prosecution and the defense assumed.

The motion to strike the government's objection to the presentence report, or in the alternative, to permit the

defendant to withdraw from the plea agreement is denied.

II.

The court has considered the materials filed by the parties in support of their objections to the presentence report and adopts the reporting probation officer's summaries contained in pages 21 through 29 of the report as a fair summary of the defendant's objections. The court's rulings are as follows:

1. The defendant objects to the statements in paragraph 28, page 7 that say [sic] he disseminated child pornography via computers to others. He points out that his conduct was not motivated by intention to gain something but that he was driven by his pedophilia. The objection is not directed to any misapplication of the sentencing statute or U.S.S.G. and constitutes an argument seeking to ameliorate the significance of Black's conduct in transmitting child pornography over the America On Line computer network.

2. With regard to paragraph 29 on the same page, the defendant argues that the statute under which he has been prosecuted penalizes him for his pedophile or ephebophile condition. He points out that he has never acted out his fantasies with pubescent boys but was passively engaged in viewing child pornography and sending it to others over the America On Line network. Again, the objection is not directed to any application of the sentencing statute or U.S.S.G., but is an argument against the application of the criminal statute to the defendant that has been considered and ruled upon by the court.

3. Black objects to paragraph 30 on page 8 because it describes the children depicted in the pornographic images as victims. Black argues as in 2 above that he committed no overt acts towards the children and merely viewed their images. He argues that he neither received nor gave financial consideration to view the images. That argument, of course, is not an objection to the accuracy of the presentence report but a contention about the injustice of prosecuting the defendant for his conduct.

4. The defendant argues that his guilty plea was timely and enabled the government to avoid preparation for trial and that as a consequence Black is entitled to a 3 point reduction in offense level instead of the 2, as contended by the government and recommended by the reporting probation officer. Black argues that after the court ruled on May 9, 1996 that the motion to dismiss the indictment was without merit, it was a foregone conclusion that Black would plead guilty to the charges against him. The court disagrees. As Black points out, after the motion to dismiss was denied, he had two main defense contentions: that his involuntary condition of pedophilia/ephebophilia was a defense to the charges; and that the jury should be instructed that if they found Black suffered from those involuntary conditions, he should be acquitted. Until June 3, 1996, when the defenses and requested jury charges were refused by the court, and until the Rule 11 proceeding was completed and the guilty plea accepted, the government and the court had no way of knowing that the defendant would not proceed to trial. 2 points is the reduction in offense level for acceptance of responsibility to which the defendant is entitled.

5. In objection to paragraph 34 on page 8, the defendant once again raises the Eighth Amendment argument that he is being punished for being an involuntary pedophile/ephebophile. The court's order of May 9, 1996 resolved that argument against the defendant.

6. Black objects to the 2 point enhancement in offense level recommended in paragraph 35, page 8 because some of the children depicted in the computer pictures were under the age of 12, *i.e.*, they were prepubescent. 20 of the 40 images charged as pornographic were depictions of children who were prepubescent. U.S.S.G. §2G2.2(b)(1) explicitly provides for the increase of 2 points and the court has heretofore rejected the defendant's Eighth Amendment argument about the impact of the statute upon the defendant. The court also rejects the defendant's contention that the enhancement for victimization of prepubescent children is a double jeopardy violation.

7. Black objects to the 5 level offense level enhancement recommended in paragraph 36 on pages 8 and 9 because his conduct was not for pecuniary gain. U.S.S.G. §2G2.2(b)(2) provides for a not less than 5 level enhancement, "If the offense involved distribution. . . . " But Application Note 1 defines "distribution" as "any act related to distribution for pecuniary gain, . . . " It is clear that Black's conduct was not motivated by pecuniary gain and the court questions why this particular enhancement should apply to Black. The conclusion that the 2G2.2(b)(2) enhancement is driven by pecuniary gain is buttressed by the reference to the retail value of the material in U.S.S.G. §2F1.1. I don't agree with the reporting probation officer on this point. The fact that the Sentencing Commission personnel pointed out that "includes" as defined in

U.S.S.G. § 1B1.1, Application Note 2, is not an exhaustive term does not persuade the court that the enhancement is intended to punish conduct other than for monetary exploitation. The objection to the recommendation in paragraph 36 is sustained.

8. The objection about the reporting probation officer's summarization of Dr. Kelly's assessment, prognosis and treatment recommendations for the defendant are without merit. Dr. Kelly's views are of interest to the court in the overall consideration of the case but have no effect on the offense level to be assigned the defendant or the appropriate disposition under the guidelines.

8a. The government has raised the objection to the grouping of the offenses under U.S.S.G. §3D1.2 for purposes of computing the adjusted offense level and asserts that each count of the indictment generates 1 unit under U.S.S.G. §3D1.4. If the victim of the offenses was society then grouping is appropriate but if the victims were the individual children in each of the pornographic depictions, then grouping is not appropriate and §3D1.4 applies. The weight of authority supports the proposition that the individual children are the primary victims of the offenses and that society as a whole is a secondary victim. *United States v. Ketcham*, 80 F.3d 789, 793 (3rd Cir. 1996); *United States v. Rugh*, 968 F.2d 750, 755-56 (8th Cir. 1992); United States v. Cipollone, 951 F.2d 1057, 1058 (9th Cir. 1991). *Contra, United States v. Toler*, 901 F.2d 399, 403 (4th Cir. 1990). Under §3D1.4 an additional 5 points must be added to the defendant's offense level.

9. The total offense level under the court's interpretation of the guidelines is 20. The criminal history category

is I. The guidelines sentence is 33 to 41 months and falls in Zone D.

10. Same observation as in 9.

11. The defendant was not suffering from diminished mental capacity[1] at the time he committed the offenses and does not qualify for a downward departure under U.S.S.G. §5K2.13 is not appropriate. In the same vein, mental and emotional conditions [pedophilia/ephebophilia] are not appropriate reasons for departure. See U.S.S.G. §5H1.3.

The defendant's "heartland of the guidelines" argument is predicated on the idea that he is an atypical offender. Does he mean that he is atypical of the pedophile/ephebophile who is driven to collect child pornography? It is apparent to the court that the consumer in the child pornography market would likely be someone who had mental or emotional tendencies similar to the defendant's and that his tendencies are certainly not unique. The senseless nature of the defendant's argument is illustrated by considering other conduct judged criminal by society. Consider the rapist who is driven by the involuntary lust for sexual gratification with pubescent girls, or driven by an involuntary phobia about elderly women. Consider the thief who is driven by involuntary kleptomania. Consider the vehicle operator who commits manslaughter because he is in the clutches

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[1] See Dr. Kelly's report.

of involuntary chemical substance dependency. The mental or emotional state of those offenders would not constitute a defense to prosecution and certainly would not be grounds for a departure from the sentencing guidelines.

The court will adopt paragraphs 1 through 102 of the presentence report, with the exceptions of paragraph 36 and paragraphs 33 and 40, as the court's findings in these final disposition proceedings.

The parties must file any written objections to the court's tentative findings no later than 8:00 a.m., September 27, 1996, and may do so by facsimile transmission. The case is set for final disposition and rulings at 1:30 p.m. on September 27, 1996, in Urbana.

Enter this 19th day of September 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States
District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CRIMINAL NO. 95-20053
BRUCE R. BLACK	)	
Defendant.	)	

STIPULATION

(Filed Jun. 3, 1996)

The parties hereby stipulate and agree that at all times material to the indictment the defendant, Bruce R. Black, was a pedophile and/or ephebophile and the receipt, collection and distribution of child pornography was a pathological symptom of the defendant's pedophilia and/or ephebophilia.

Respectfully submitted,

FRANCES C. HULIN
United States Attorney

By: /s/ Colin S. Bruce
COLIN S. BRUCE
Assistant United States Attorney

/s/ Bruce R. Black
BRUCE R. BLACK
Defendant

/s/ John H. Bisbee
JOHN H. BISBEE
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CRIMINAL NO.
BRUCE R. BLACK	)	95-20053
Defendant.	)	

STIPULATION

(Filed Jun. 3, 1996)

The parties stipulate and agree that at all times material to the indictment, the defendant, Bruce R. Black, did not receive, collect, or distribute child pornography for commercial purposes or monetary gain.

The parties further stipulate and agree that at all times material to the indictment, the defendant, Bruce R. Black, did not trade child pornography on a numerically equal basis with other individuals who received, collected or distributed child pornography.

Respectfully submitted,

FRANCES C. HULIN
United States Attorney

By: /s/ Colin S. Bruce
COLIN S. BRUCE
Assistant United States Attorney

/s/ Bruce R. Black
BRUCE R. BLACK
Defendant

/s/ John H. Bisbee
JOHN H. BISBEE
Attorney for
Defendant

[SEAL]

U.S. Department of Justice

United States Attorney
Central District of Illinois
Headquarters Office
Springfield, IL 62705

Reply to:
Urbana Division Office
Urbana Federal Building and U.S. Courthouse
201 South Vine Street, Suite 226
Urbana, Illinois 61801
217/373-5875
FAX 217/373-5891

June 3, 1996

Mr. John H. Bisbee
Attorney at Law
437 N. Lafayette Street
Macomb, IL 61455-1550

VIA FACSIMILE, UNITED STATES MAIL AND HAND DELIVERY

(Filed Jun. 3, 1996)

Re: United States v. Bruce R. Black

Dear John:

Pursuant to our discussions of Thursday and Friday, May 30 and 31, this letter is to formalize the agreement surrounding the stipulation regarding Mr. Black's status as a pedophile and ephebophile.

The United States will *not* argue in any subsequent proceeding or manner that Mr. Black voluntarily chose to become a pedophile or ephebophile. My understanding from talking to the United States's expert, Dr. Kelly, is

that an individual may not voluntarily choose to become a pedophile or ephebophile in the same manner that a person may not simply voluntarily choose to become a claustrophobic or an agoraphobic. Likewise, a pathological symptom of *Mr. Black's* pedophilia or ephebophilia was the collection of child pornography.

The United States will, however, continue to argue that Mr. Black voluntarily chose to receive, collect and distribute child pornography, and voluntarily chose the manner and means by which it was received, collected and distributed. Furthermore, the United States will continue to argue that Mr. Black's conduct in this regard was done knowingly and intentionally. The dispute over this aspect of Mr. Black's conduct is really one of the critical issues in our case.

/s/ Colin Bruce
Assistant United States Attorney

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 95-20053

BRUCE R. BLACK,
Defendant.

ORDER

(Filed Jun. 4, 1996)

This matter is before the court for a pretrial conference under Federal Rule of Criminal Procedure 17.1. The United States appears through Colin S. Bruce, Assistant United States Attorney. The defendant appears personally accompanied by his attorney John Bisbee.

The government has filed a witness and exhibit list and delivered copies to the defendant.

There is pending a number of motions *in limine*. The government has moved to preclude the defendant from offering opinion evidence, so-called expert witness evidence, on the defendant's stipulated condition of pedophilia or ephebophilia as a defense in the case. After extensive colloquy with the Assistant United States Attorney who is prosecuting the case and with defense counsel, it is clear that the defendant is not claiming insanity as a defense as that term is defined in 18 U.S.C. §17. The defendant does not contend, within the meaning of Section 17, that his psychological condition of pedophilia or

ephebophilia rendered him unable to appreciate the nature and quality of wrongfulness of his conduct. He does contend that he did not understand his acts were illegal or unlawful. It is clear from Section 17 that such a position does not constitute a defense to the crime charged. The government's motion *in limine* then to exclude testimony about the defendant's condition of pedophilia or ephebophilia is allowed because that evidence is irrelevant.

The further aspect of the government's motion *in limine* asks that the defendant be precluded from arguing to the jury that he did not understand his conduct was illegal or that he was acting in an unlawful manner. The portion of the motion to exclude evidence and argument on that point is also allowed. The element of the offense that must be proved by the government is knowledge, not that the defendant acted willfully in contravention of a known statutory prohibition. Willfulness in that sense is not an element in this case. Knowledge is, as defined in the standard jury instruction about acting knowingly.

I make this order in light of and accepting the stipulations of the parties that have been filed in the record.

The motion by the defendant *in limine* is denied. The defendant has also filed a series of motions asking for explanation of the court's ruling denying the motion to dismiss the indictment. I don't understand all those motions. To the extent that the defendant thinks the court excluded some sort of proffer on his part, I accept those proffers. I had all the defendant's materials before me when I considered the motions. I saw the tender of the

proposed additional examination of the government psychiatrist, and assuming that all that material was before the court, my ruling remains the same.

Enter this 4th day of June 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States District Judge

[p. 61] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Case No.: 95-20053
BRUCE R. BLACK, Defendant.	)	

REPORT OF PROCEEDINGS

DATE: JUNE 3RD, 1996
HEARING ON ALL
PENDING MOTIONS
BEFORE: HAROLD A. BAKER
Judge Presiding

APPEARANCES:

FOR THE GOVERNMENT: MR. COLIN BRUCE
Assistant U.S. Attorney
201 S. Vine
Urbana, IL 61801

FOR THE DEFENDANT: MR. JOHN H. BISBEE
Attorney-at-Law
437 N. Lafayette Street
Macomb, IL 61455

Toni M. Judd
U.S. Court Reporter
201 South Vine
Urbana, Il 61801
(217) 373-5830

[p. 62] THE CLERK: United States of America v. Bruce Black, 95-20053.

THE COURT: State your appearance for the United States.

MR. BRUCE: Colin Bruce and Kathy McClure on behalf of the United States.

THE COURT: For the defendant.

MR. BISBEE: John Bisbee on behalf of Mr. Black, who is also present.

THE COURT: All right. This is a conference under 17.1 and there are a number of motions. The government, I think, has a *motion in limine*. The defendant just filed one. And I also have the government's witness list and exhibit list.

And I am puzzled, Mr. Bisbee, about what you expect the court to do in your motions. There is no summary judgment procedure in the criminal law. Assuming there was, there isn't. There are contested facts about whether necessity to possess child pornography is an essential aspect of pedophilia or ephebophilia. I can't imagine that the government will stipulate that that is an essential aspect of the condition. I don't know that there is any dispute about it being an unbidden condition.

You asked me to resolve what are factual disputes, Mr. Bisbee. The psychiatrist the government [p. 63] produced from the Isaac Ray Center who did not agree that there was a compulsion or a necessity to possess child pornography though accompanied pedophilia or ephebophilia, though the witness discussed pedophilia. So I don't see how you are going to resolve any of these

questions short of a stipulation or an agreement without going to trial.

Now, I would be glad to hear from counsel.

MR. BRUCE: Your Honor, if I may.

THE COURT: Yes.

MR. BRUCE: The government's *motion in limine* goes directly to the point Your Honor is raising. We have entered into a stipulation with Mr. Bisbee regarding Mr. Black that he is a pedophile or ephebophile, and that a symptom of Mr. Black's pedophilia or ephebophilia involved the distribution, receipt, and collection of child pornography. But not as to all pedophiles or ephebophiles.

THE COURT: No, there is a big distinction there between being a symptom of his particular case and what I understood Mr. Bisbee to contend for in his motion that this was an essential aspect of all pedophiles or ephebophiles.

MR. BRUCE: You are correct. We have only agreed that it is a pathological symptom of Mr. Black's pedophilia or ephebophilia. Essentially, Your Honor, the

* * *

[p. 68] government's, the first portion of the government's *motion in limine* mirrored the court's own order.

THE COURT: But you know I was taking the motion to dismiss with all of the facts granted. In other words, as you would, assuming, well-pleaded facts were true, it still comes out so. That still isn't going to make me dismiss the indictment. It still charges a crime.

MR. BRUCE: That's why the government's *motion in limine* seeks to preclude Mr. Bisbee, in essence, from arguing his client is a pedophile. I don't care if it's voluntarily or involuntarily, and as a part of Mr. Black's pedophilia is a portion of child pornography, that doesn't mean as a matter of law he must be acquitted.

THE COURT: All the court's ruling on the motion to dismiss really was, or the sum of the motion is that it's denied because the indictment charges a crime and you are trying to read more into it and that is not right. I would like Mr. Bisbee to tell me is he pleading insanity. What are you pleading?

MR. BRUCE: May I sit down, Your Honor?

THE COURT: Yes, or continue to stand. Yes, sir.

MR. BISBEE: Well, Your Honor, far be it for me to leap the court into murky waters, but the stipulation that we have is this: "The parties hereby agree and [p. 69] stipulate that at all times material to the indictment the defendant, Bruce R. Black, was a pedophile, and slash, or ephebophile, and the receipt, collection, and distribution of child pornography was a pathological symptom of the defendant's pedophilia and slash ephebophilia."

Now, the defense is psychiatrically characterized as a psychotherapy sexual disorder, or a psychiatric sexual disorder. The insanity rule contemplated by the federal court is that, of course, pronounced by the *McNaughton* case, namely, did the defendant know right from wrong. and there is a variation on that as to whether or not a defendant was able to conform his conduct to the standard demanded of him by the law.

Now, that latter portion of the mental condition type defense, which is a variant of the old *Durham* rule is certainly an aspect of this. But the defendant is not pleading not guilty by reason of insanity or anything else.

The defense here is one strictly recognized in two Supreme Court cases, which remain vibrant law, not just vital, but vibrant law to this day that announced in *Robinson v. California* and *Powell v. Texas*. Namely, that someone cannot be criminalized by reason of his status, or condition, and acts symptomatic of that status or condition. Therefore, I hope the court gives me enough credit to realize that I understand that summary judgment

* * *

[p. 71] tomorrow morning for trial. But to the extent that you did intend to say that, this case is more or less in a civil summary judgment posture; and, in that case, Mr. Bruce's *motion in limine* is probably well taken to the extent the court meant what it said and does not wish to reconsider, as I strongly think that it should in light of the fact that the court relied upon the four justice plurality in *Powell v. Texas* rather than the five justice view expressed by Justice White in his concurring opinion in *Powell v. Texas*, as I pointed out in a motion for reconsideration.

But that being the case, I do think if the court is going to deny the government's *motion in limine*, I guess we are going to trial. And I didn't prepare a witness list because my witness list is to Mr. Black and Dr. Grant.

THE COURT: Does this stipulation also stipulate that on the days in question Mr. Black received transmitted and possessed child pornography?

MR. BISBEE: I will tender to the court, if I may, the original copy of the stipulation, which has been signed.

MR. BRUCE: Judge, there is another stipulation that says what the court just asked.

THE COURT: That Mr. Black did receive, transmit, and possess?

[p. 72] MR. BISBEE: Yes. Yes. I have stipulated to all of that.

MR. BRUCE: By interstate commerce.

THE COURT: By interstate commerce through his computer.

MR. BRUCE: From Champaign to America On-Line, yes, there is shall, Your Honor.

MR. BISBEE: That's why if you deny the government's *motion in limine,* you should really grant my *motion in limine* because I am stipulating that all of this stuff does fall within the statutory prohibition of child pornography, that it was pornographic, and all of that other kind of business. So I just want to save the court a whole bunch of money having to put that all on, and which would also probably revolt the jury in a whole lot of respects that I don't think would be very helpful to the courtroom in terms of the cleaning and custodial matters.

THE COURT: Isn't this tantamount to a plea of guilty?

MR. BISBEE: Not yet. If the court –

THE COURT: If you stipulate and admit all of the facts which constitute the offense under the statute, plus you have got this additional one –

MR. BISBEE: The additional one is very material, Your Honor. It's an affirmative defense.

[p. 73] THE COURT: I know it's material. But, in effect, you are stipulating that you committed the crime charged in the statute.

MR. BISBEE: Committed the acts charged in the statute. We do not stipulate that it was a crime. Because we do not stipulate as to Mr. Black it could be made a crime. In fact, we say as a matter of Eighth Amendment law it could not be made a crime.

Mr. Bruce asked – may I hand you the other stipulations?

THE COURT: in Section 17 of Title 18, talking about insanity defense, which I am sure you are familiar with, it talks about a mental defect rendering the defendant unable to appreciate the nature and quality or the wrongfulness of his acts.

Now, is it your position that Mr. Black, because of his mental defect, was unable to appreciate the nature and quality or the wrongfulness of his act?

MR. BISBEE: My position is that Mr. Black did not appreciate the wrongfulness of his acts in the sense of the rule of lenity argument. I am not saying that Mr. Black is insane or otherwise has a mental defect beyond the psychiatric sexual condition of pedophilia or

ephebophilia. Pathological symptom of which is the fascination with the collection of child pornography. In other words, I don't

* * *

[p. 85] surreptitious part of his life for about twelve years.

By the same token we are not talking about insanity in the sense that the man is not capable of functioning in the world. He is. But he does suffer from this condition, which is a condition resulting from a misallocation of hormones to which any one of us could have been subjected at birth or thereabouts. And that's the problem here. You don't criminalize somebody because he got the short shrift on hormones.

THE COURT: these stipulations are ones that you are just filing today, is that right?

MR. BRUCE: That's correct.

THE COURT: Here file them, Marilyn.

We will have a recess.

(Whereupon, a brief recess ensued.)

THE COURT: I am looking at the letter filed June 3rd with the clerk, Mr. Bisbee, from Mr. Bruce to you the point of whether Mr. Black acted voluntarily is raised in the letter. And, of course, to act knowingly is to act voluntarily and intentionally, and not through mistake, or accident, or innocent reason.

Is it your position that when Mr. Black received, transmitted, and collected the child pornography through

the America On-Line facility, that he acted voluntarily? You agree he acted voluntarily?

[p. 86] MR. BISBEE: He acted voluntarily in the sense that the act was volitional on his part. He acted knowingly in that he knew what he was receiving was child pornography. He did not act voluntarily in the sense that he knew it was against the law. He did not act voluntarily he knew in the sense that he was able to overcome the symptom of his mental psychiatric sexual condition.

THE COURT: (Court chuckles.)

MR. BISBEE: In other words, perhaps the court, I hope the court doesn't think I am trying to hedge an answer or give you a fuzzy answer. I think that perhaps sounded like a fuzzy answer. These words, these adjectives have a lot of meanings of art. He acted voluntarily and we do not contend that he didn't know what he was doing. But he acted involuntarily in the sense that he had no power to control what he was doing.

Now, I don't understand Mr. Bruce to be controverting that. Maybe he is. I don't want to speak for him in that respect.

THE COURT: Well, what the United States Attorney's position is Mr. Black voluntarily chose to receive, collect, and distribute child pornography. And voluntarily chose the manner and by means of which it was received collected and distributed.

[p. 87] MR. BISBEE: I would submit, Your Honor, that that language is at variance with the stipulation that has been filed to the extent that the stipulation

to which, in which the government has entered says that the collection of child pornography is pathologically symptomatic of pedophilia or ephebophilia. To that extent, his actions cannot be voluntary.

This letter is a letter that Mr. Bruce sent me to accommodate the fact that the word, that he was involuntarily an ephebophile or pedophile was not put in the stipulation.

I do not stipulate to the last paragraph of Mr. Bruce's letter in terms of its truth or accuracy.

THE COURT: That isn't a stipulation. That's Mr. Bruce making an assertion unilaterally.

MR. BISBEE: Yes.

THE COURT: But it helps me understand what there is agreement upon and what there is not agreement upon.

MR. BRUCE: Judge, the very reason I filed the letter was what Your Honor just said. I wanted to understand the context in which that stipulation was entered into. That is both the government's expert and I presume the defendant's expert would indicate that no one voluntarily chooses to become a pedophile in the sense that no one voluntarily sets out to be claustrophobia or [p. 88] agoraphobic or any other phobia for that matter.

However, the government maintains that Mr. Black voluntarily chose to receive the pornography, collect it, and distribute it. All child pornography. To the extent that Mr. Bisbee wishes to read the stipulation in a different manner, that would not be correct.

The reason that the stipulation says the defendant's pedophilia or ephebophilia is just that. I would say that in the same sense that a person who is a heroin addict may find it desirous to obtain heroin and use heroin, possibly sell heroin, that doesn't mean they don't act involuntarily when they go out and plan, negotiate, and buy heroin.

THE COURT: Addiction doesn't negate voluntary action.

MR. BRUCE: That's exactly correct, Your Honor.

THE COURT: One of the elements, Mr. Bisbee. I understand what is being said on that. One of the elements of the offense would be the defendant's acting knowingly and the standard definition is the word "knowingly" is used in the instructions. It means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident.

Is it your idea that the stipulation would [p. 89] include that, that Mr. Black acted knowingly when he transmitted, received, and possessed the child pornography?

MR. BISBEE: Yes. Which he was powerless to, to avoid doing that. Just like the alcoholic in *Powell v. Texas* under the Public Intoxication Statute.

THE COURT: I don't think that's a fair analogy to the facts of *Powell and Texas.*

All right. In *United States v. Black,* 95-20053, this matter is before the court for a pretrial conference under

Federal Rule of Criminal Procedure 17.1. The government has filed its witness list and exhibit list, and delivered copies to the defendant. There are, there is pending a number of *motions in limine.*

The government has moved to preclude the defendant from offering opinion evidence, so-called expert witness evidence on the defendant's stipulated condition of pedophilia or ephebophilia as a defense in the case.

After extensive colloquy with the Assistant United States Attorney, who is prosecuting the case and with defense counsel, it's clear that the defendant is not claiming insanity as a defense, as that term is defined in 18 United States Code Section 17.

The defendant is not contending that he was unable to appreciate the nature and quality or wrongfulness of his conduct.

[p. 90] MR. BISBEE: Objection, Your Honor, that is not correct.

THE COURT: Is that right?

MR. BISBEE: Yes. Part of the rule of lenity argument is this. We do not admit that Mr. Black understood that what he was doing was illegal. Now, whether it was morally wrong or wrong by some other standard that he may have appreciated, but we certainly do not; and the offer of proof I made consistently with Mr. Black's history given to Dr. Kelly shows that he did not have any appreciation of the legal wrongfulness of his action. And the other instruction that I would seek in this case is that he could not be found guilty until or unless the jury could

conclude that what he knew what he did was legally wrong.

MR. BRUCE: Your Honor, my brief response to that.

THE COURT: I didn't want to hear any responses. He didn't say anything that he didn't say before, and I apologize Mr. Bruce for being abrupt with you.

MR. BRUCE: That's fine.

THE COURT: He hasn't said anything that he hasn't said before and it doesn't detract from the fact that I put it to you that that is not claiming the defense of Section 17, but is some other claim about understanding [p. 91] wrongfulness of conduct. That he does not claim within the meaning of Section 17 that he was unable to appreciate the nature and quality or the wrongfulness of his acts. He does contend that he didn't understand his acts were illegal or unlawful.

MR. BISBEE: That's correct.

THE COURT: It's clear from Section 17 that such a position does not constitute a defense to the crime charged. The government's *motion in limine* then to exclude testimony about the defendant's condition of pedophilia or ephebophilia is allowed because that evidence is irrelevant.

The further aspect of the government's *motion in limine* asks that the defendant be precluded from arguing to the jury that he didn't understand his conduct was illegal or that he was acting in an unlawful manner. The portion of the motion to exclude evidence and argument

on that point is also allowed. The element of the offense that must be proved by the government is knowledge. Not that the defendant acted willfully in contravention of known statutory prohibition. Willfulness in that sense is not an element in this case. Knowledge is, as stated in the standard instruction about acting knowingly.

Now, I make this order in light of and accepting the stipulations of the parties that have been handed to [p. 92] me, the three stipulations. I should ask Mr. Black are you familiar with these stipulations?

THE DEFENDANT: Yes, I am, sir.

THE COURT: And do you understand in your discussions with Mr. Bisbee that you don't have to stipulate to anything?

THE DEFENDANT: I understand.

THE COURT: All right. Then I will accept the stipulations. The case is set for trial tomorrow morning. The motion by the defendant in limine is denied. The defendant has also filed a series of motions for explanation of the court's ruling denying the motion to dismiss. I don't understand all of those motions to the extent that you think I excluded some sort of proffer on your part. I accept those proffers. I had all these materials with me when I considered the motions. I saw the additional tender of supposed examination of the government's psychiatrist, and assuming that all of that is made my ruling remains the same.

MR. BISBEE: I was going to withdraw those motions to the extent that was the case.

THE COURT: And otherwise all pending motions then are mooted, any ones I didn't rule on, and I will see you tomorrow morning for jury selection. All right. What's next on the call?

[p. 93] MR. BISBEE: Could I talk to Mr. Bruce for one second?

THE COURT: We will have a ten-minute recess. Court's in recess. We will reconvene at 3 o'clock.

(Whereupon, the parties return to open court.)

THE COURT: What's happening?

MR. BRUCE: Judge, we just now filed a conditional plea agreement and two positions papers regarding the defendant's bond status.

THE COURT: Where are they?

THE CLERK: Right there on top.

THE COURT: Oh. Here we go. Would you want to fill the date in on this, Mr. Bisbee, where you and Mr. Black signed?

MR. BISBEE: Certainly.

THE COURT: I assume that inadvertent.

MR. BISBEE: Most of my stuff is inadvertent, Your Honor. Sorry.

THE COURT: I would only have this to say about your plea agreement. You should reserve the right to appeal from the order excluding the defense, and I dictated I had this thing running while I spoke, and I want to amend that or look at it and edit it so I don't appear completely inarticulate.

[p. 94] MR. BISBEE: We will be happy to submit an amended plea agreement.

THE COURT: I just think it's none of my business, but I think you would want to preserve that question, because that ruling encompasses the stipulations and everything that happened subsequent to the motion to dismiss, and I would think that those would raise issues on appeal.

MR. BISBEE: That certainly is our intention, Your Honor. And I appreciate the court bringing that to my attention.

THE COURT: I gather without going through this, that you really have no objection to his being enlarged on bail? Do you have any – I should ask probation, any indication of his being a predator or offering a threat to the community?

MR. BRUCE: Judge, are you asking me?

THE COURT: Yes, you are the United States Attorney.

MR. BRUCE: I thought you were speaking to the Probation Officer. I am sorry.

THE COURT: I said do you know of anything through the probation officer. The probation officer who was here left.

MR. BRUCE: I thought he was still here. I [p. 95] apologize. Our position on whether he remains on bond or not, Mrs. Hulin has asked me to be very specific about this that is why I filed a written pleading. Under

the statute, it is mandated that he be detained upon pleading guilty. However, there are exceptions, and I laid out the statutory formula in the pleading. If the court wishes to have Mr. Black out on bond, the court will need to find exceptional reasons why detention of the defendant is inappropriate, and I have been directed to advise you that the position of the United States is that it is within your sound discretion. I believe Mr. Bisbee may have arguments to provide to the court to find reasons.

THE COURT: I would like to confer with probation. And I know of no information indicating that Mr. Black does anything but watch. I would be interested to know if there is any indication of being a predator, and I am a person who used that term.

The clerk tells me you don't want to enter the plea today. Is that wrong?

MR. BRUCE: Judge, we will do it whenever you choose to do it.

MR. BISBEE: We didn't want to create the necessity whereby you had to call a jury.

THE COURT: The jury is coming, but it effects us how many jurors. We will summon the whole venire if we

* * *

[p. 110] and the matter is allotted for final disposition –

THE CLERK: – September 18th at 1:30.

THE COURT: All right. There comes the question now of being enlarged on bail pending final disposition. The government has supplied the court with its

position on detention or release of the defendant. Mr. Russell and Mr. Nebergall, does the Probation Service have any information from its supervision of Mr. Black during his period of time that he is a predator or has committed any acts that would constitute a threat to society?

MR. NEBERGALL: Judge, Miss Auger is unavailable today, and I perused the chronologicals up until today and I could not see anything in there that would go to what you have addressed

THE COURT: Finding by the court that the evidence is clear and convincing that the defendant will not flee and he offers no overt threat to society. There is the question, too, of his continued cooperation with the government and his, he is continued enlarged on bail pending final disposition. Anything else?

MR. BRUCE: Judge, I may have misheard you. Could you enter in the order also that the property named in the indictment is forfeited to the United States.

THE COURT: Doesn't that come at final disposition?

[p. 111] MR. BRUCE: I heard you also say that at a change of plea. I am not sure.

THE COURT: When did you hear me say that?

MR. BRUCE: On other occasions on change of pleas, you say that the property is forfeited to the United States.

THE COURT: I will do it at final disposition. You have got control over it, don't you?

MR. BRUCE: Absolutely.

THE COURT: It will be safe until them. Go see the gentleman – Mr. Russell, who is going to do this?

MR. RUSSELL: I am, Your Honor.

THE COURT: Go see Mr. Russell. Now, let me tell you something about this presentence report, Mr. Black. It's a very important document. It's the document the court will rely on in deciding what an appropriate disposition is. So you want to have the report be complete and accurate. You may have to have Mr. Bisbee assist you in marshalling together the information that the Probation Service will ask for.

You will get a copy of that final disposition report in advance of the date it was set for final disposition. You will get an opportunity to discuss any questions you have with the probation officer on an informal basis. If you have objections to the report, you [p. 112] may be able to work them out informally with the probation officer. If you are unable to do that, you may raise your objections or questions with the court formally for disposition at that final hearing. Anything else?

MR. BRUCE: No.

MR. BISBEE: Do I understand that the defendant's motion for release pending appeal, disposition of the appeal will be heard at the later time?

THE COURT: One step at a time. He is released pending final disposition and we will have to cross that bridge when we come to it.

MR. BISBEE: All right.

MR. BRUCE: Okay. The court's in recess.

COURT REPORTER'S CERTIFICATE

I, TONI M. JUDD, United States Court Reporter, certify that the aforementioned cause is a true and accurate transcript of the proceedings held before the Honorable Harold A. Baker, Judge Presiding.

/s/ Toni M. Judd

APPENDIX K

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

BRUCE R. BLACK,
DEFENDANT.

ORDER

(Filed May 09, 1996)

The defendant is under indictment for violation of 18 U.S.C. §2252 (activities relating to material involving the sexual exploitation of minors). He is charged with distribution, receipt and possession of child pornography. The defendant has moved to dismiss the indictment and argues that:

(1) The indictment seeks to punish him for engaging in activities protected under the First Amendment;

(2) The indictment seeks to punish him for being a pediophile in violation of the Eighth Amendment;

(3) The indictment seeks to punish him for an offense that doesn't require knowledge by the defendant of the criminal nature of his conduct; and, (4) the indictment is time barred.

The defendant requested and received an evidentiary hearing in support of his arguments. He also submitted a

written proffer off evidence as additional support for his arguments.[1] Taking that evidence in the light most favorable to the defendant for the purposes of this motion, but without deciding the factual questions he raises, the court assumes certain points. First, the defendant is a pedophile. Second, between September 1994 and August 1995, the defendant transmitted, received and possessed a collection of child pornography on his personal computer through a commercial service providing access to the Internet. Third, he used that collection as visual stimulation for his sexual fantasies and gratification. Fourth, he did all this in the privacy of his home.

Child pornography is not entitled to First Amendment protection if the prohibited conduct is sufficiently described. *New York v. Ferber*, 458 U.S. 747, 762 (1992). The criminalization of possession, transmission and receipt of child pornography under §2252 serves a compelling government purpose. "It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing the demand." *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990). It is equally clear that commercial motive is not a necessary ingredient of the offenses of possession, transmission and

---

[1] It appears that in this criminal case the defendant is seeking a summary judgment of acquital [sic] as a matter of law, much as a party in a civil case might seek summary judgment under F.R.Civ.P. 56. That is, of course, a procedure unknown in the criminal practice. Certainly the court could not decide upon the credibility of the two psychiatrists who testified at the evidentiary hearing or decide fact issues before the government had put on its evidence.

receipt of child pornography. *United States v. Andersson*, 803 F.2d 903, 906 (7th Cir. 1986). Reliance by the defendant upon *Stanley v. Georgia*, 394 U.S. 557 (1969) as the linchpin of his First Amendment argument is misplaced. *Stanley* is a case about the receipt of information and ideas; Mr. Black's case is about preventing the sexual exploitation of children by punishing the receipt, transmission and possession, of child pornography. The court finds no merit in the defendant's First Amendment arguments.

The Eighth Amendment argument is also without merit. The defendant is not singled out for prosecution because he is a pedophile. He is prosecuted because it is alleged he transmitted, received and possessed material depicting children engaging in explicit sexual conduct. Assuming that the condition of pedophilia is unbidden, as the defendant's psychiatrist testified, it would not constitute a defense to the charged offense. Assuming further that the collection of child pornography was necessary to the unbidden condition, there is still no defense to the criminal conduct alleged in the indictment. Explaining its decision in *Robinson v. California*, 370 U.S. 660 (1962) the Supreme Court in *Powell v. Texas* said:

> The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms has committed some *actus reus*. It does not deal with the question of whether certain conduct cannot constitutionally

> be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Powell v. Texas, 392 U.S. 514, 533 (1968)

The statute of limitations on the charged offenses bars them after a period of five years. 18 U.S.C. §3282. The conduct which is the subject of the prosecution took place between September 1994 and August 1995. The indictment was in 1995. No statute of limitation question is involved. The defendant is not charged with the creation of the child pornography but with its possession, transmission and receipt. The argument about limitation arising with the creation of the pornography is frivolous.

Finally the defendant argues that he didn't know he was committing a criminal act by receiving, transmitting or possessing child pornography and that he had no commercial motive in his activities. That argument has been previously met and rejected by the courts. *Hamling v. United States*, 418 U.S. 87, 123 (1974) held that it was unnecessary to prove a defendant's knowledge that it was illegal to distribute obscene materials. Knowledge of the nature of the materials was sufficient. The Third Circuit adopted that analysis in dealing with the issue of knowledge in a child pornography prosecution. *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1992) held that "to fulfill the knowledge element of §2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *Id.* at 754. *Accord, United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989). Nothing in the statute suggests a requirement that a defendant have the specific intent to

violate the law. All that is required is that the defendant act knowingly.

It is ordered that the defendant's motion to dismiss the indictment and his supplemental motion are denied. It is further ordered that the defendant's motion for further evidentiary hearing in support of his motions is denied. The case is set for jury selection and trial on June 4, 1996 at 9:00 a.m. before the court sitting in Urbana.

Enter this 9th day of May 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States
District Judge

APPENDIX L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v.

BRUCE R. BLACK
Defendant

ORDER SETTING CONDITIONS OF RELEASE

Case Number: 95-7224M

IT IS ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall next appear at (if blank, to be notified) _____ on
Place

_____
Date and Time

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

(X) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of Ten Thousand Dollars (O/R dollars ($10,000) in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

PRETRIAL RELEASE REPORTING INSTRUCTIONS

DEFENDANT	DISTRICT COURT	DOCKET NO.
Bruce R Black	Urbana	95-7224M

CASE SUPERVISOR	TELEPHONE NUMBER
SCS/VK	217-373-5851

REPORT AS FOLLOWS:

In Person:

By Telephone: Call Susan C Silver, US Probation Officer at 217-373-5851 on 8-25-95 (Friday) for additional instructions

Additional Instructions: Advise Officer Silver immediately if/when you move out of Baytowne Apartments and into your parents residence at 488 Malsburry, Rantoul, Ph 217-873-1464

Home visits will be conducted throughout your period of supervision.

Notify your Pretrial Services Officer immediately of any change in address, telephone, or employment.

_____ days notice must be given for approval of travel outside restricted area.

You shall not commit a federal, state, or local crime during the period of release. You shall inform the Pretrial Services/Probation Officer immediately if you are charged with any offense.

DEFENDANT'S STATEMENT

I understand the above stated instructions and understand that failure to comply will be reported to the Court and may result in the revocation of my bond and my detention pending the outcome of my case.

SIGNATURE OF DEFENDANT /s/ Bruce Black	DATE 8-24-95
UNITED STATES PRETRIAL SERVICES OFFICER Illegible	DATE 8-24-95

APPENDIX M

UNITED STATES DISTRICT COURT
_____ District of MASSACHUSETTS

UNITED STATES OF AMERICA

V.

WILLIAM L. GIFFORD
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
92-10132-01-NGY

Ann Marie Bassett
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section
Illegible

Nature of Offense
Sexual Exploitation of Children

Date Offense Concluded
9/92

Count Number(s)
1

The defendant is sentenced as provided in pages 2 through ____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 1 , which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 025-32-5401

Defendant's Date of Birth: 1/20/42

Defendant's Mailing Address:
Illegible
Illegible

Defendant's Residence Address:
Illegible
Illegible

April 12, 1994
Date of Imposition of Sentence

/s/ William G. Young
Signature of Judicial Officer

William G. Young, USDJ
Name & Title of Judicial Officer

April 12, 1994
Date

Defendant: William Gifford
Case Number: 92-10132-01

PROBATION

The defendant is hereby placed on probation for a term of 3 years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

the defendant is to participate in psychological counseling at his own expense

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 5,000 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

X as directed by the Chief U.S. Probation Officer

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 15

Criminal History Category: 1

Imprisonment Range: 18 to 24 months

Supervised Release Range: 2 to 3 years

Fine Range: $ _____ to $ _____

[ ] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	CASE NO. 3:94CR 229 (PCD)
JOHN F. BARTON JR.	
19 Maple Street Kent, Connecticut 05757 SSN: 044-38-8353 DOB: 02/19/46	Joseph Illegible Defendant's Attorney

The Judgment of 01/23/95 is hereby VACATED.

The defendant *pleaded* guilty to counts One and Two. Accordingly, the defendant is adjudged guilty of counts One (01) and Two (02), which involve the following offenses:

Title & Section: 18:2252(a)(2) and 18:2253(a)	Counts: One (01) and Two (02)

Nature of Offense: Receiving in Interstate Commerce material involving visual depiction of minors engaged in sexually explicit conduct.

Date Offense Concluded: 05/27/94

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant is placed on probation for a term of three (3) years.

Special Conditions include: Defendant shall continue participation in the program he is presently enrolled in and any other psychiatric and/or psychological programs as may be deemed necessary by the United States Probation Office (USPO).

It is further Ordered that the defendant shall notify the United States Attorney for this district within 30 days of any changes of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. In addition to the special conditions of probation/supervised release expressed above, it is hereby Ordered that the general conditions of probation/supervised release set out on the reverse side be incurred.

Date of Imposition of Sentence.
August 27, 1996

/s/ Peter C. Dorsey
Peter C. Dorsey, Chief Judge,
August 29, 1996 United States
District Court

CERTIFIED AS A TRUE COPY
ON THIS DATE 8/30/96
BY: /s/ Illegible
Deputy Clerk

APPENDIX O

§ 5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed

in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range

may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

APPENDIX P

§ 5K2.13. Diminished Capacity (Policy Statement)

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

(Effective November 1, 1987.)